APPENDIX

In The

Supreme Court of the United States

October Term, 1977

No. 77-677

OWEN EQUIPMENT AND ERECTION COMPANY,
A Nebraska Corporation,

Petitioner,

vs.

GERALDINE KROGER, Administratrix of the Estate of JAMES D. KROGER, Deceased,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 11, 1977

CERTIORARI GRANTED JANUARY 9, 1978

COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

INDEX

INDEX—Continued

RELEVANT DOCKET ENTRIES

1972		
Nov 24	1.	Complaint.
1973		
Aug 24	17.	Defendant's Third Party Complaint.
Sep 7	20.	Voluntary Motion to Dismiss by Defendant and Third Party Plaintiff.
Sep 7	21.	Order that Third Party Defendant Owen Construction Co. is dismissed from action; Defendant and Third Party Plaintiff is granted permission to file Amended Third Party Complaint.
Sep 11	23.	Amended Third Party Complaint of O.P.P.D.
Sep 24	27.	Motion to Dismiss by Paxton & Vierling Co.
Sep 28	28.	Plaintiff's Motion for Order allowing Plaintiff to add Owen Equipment & Erection Co. as Party Defendant.
Oct 15	29.	Answer of Third Party Defendant Owen Equipment & Erection.
Oct 30	30.	Motion of Defendant and Third Party Plaintiff for Summary Judgment.
Nov 7	33.	Memorandum & Order that Paxton & Vierling's Motion to Dismiss is overruled; Plaintiff's Motion to add a party is granted; Plaintiff to have 10 days to file amended pleadings.
Nov 9	36.	Plaintiff's Amended Complaint.
Nov 27	41.	Defendant Owen Equipment & Erection Company's Answer to Amended Complaint.
Nov 27	42.	Defendant Paxton & Vierling Steel Co.'s Answers to Request for Admissions.

1974

May 23 57. Courtroom Minutes—Hearing on Third Party Defendant's Motion for Summary Judgment.

Jun 17 59. Defendant and Third Party Plaintiff's Interrogatories to Defendant and Third Party Defendant, Owen Equipment & Erection Company.

July 13 66. Third Party Defendant's Owen Equipment Co.'s Answers to Interrogatories.

Aug 23 67. Memorandum and Order.

Aug 23 68. Order that Defendant's Motion for Summary Judgment be granted.

Sep 4 69. Motion for Summary Judgment with request for oral argument by Defendant Owen Equipment & Erection Co.

1975

Feb 12 74. Order directing entry of final judgment dismissing Defendant Omaha Public Power District with determination of no reason to delay appeal.

Feb 12 75. Clerk's Judgment dismissing Defendant Omaha Public Power District with prejudice and with taxable costs against Plaintiff.

Oct 1 76. Certified copy of Judgment.

Oct 2 77. Order setting Oral Argument on Defendant's Motion for Summary Judgment for 10-10-75.

Oct 10 78. Courtroom Minutes.

Nov 14 81. Order that Motion for Summary Judgment is denied.

1976

Jan 12 84. Courtroom Minutes.

Jan 13 86. Answer of Defendant Owen Equipment & Erection Co.

Jan 13 87. Courtroom Minutes.

Jan 14 88. Courtroom Minutes.

Jan 15 89. Defendant's Motion to Strike.

Jan 15 90. Defendant's Motion for leave to file an Answer to Plaintiff's Amended Complaint.

Jan 15 91. Defendant's Motion for Dismissal or for Directed Verdict.

Jan 15 92. Defendant's Requested Instruction to the Jury.

Jan 16 94. Courtroom Minutes.

Jan 16 95. Jury Verdict for Plaintiff and against Defendant.

Jan 16 96. List of Witnesses.

Jan 19 98. Court's Charge to the Jury.

Jan 20 99. Judgment wherein it is ordered that Plaintiff recover of the Defendant the sum of $234,-756.00 and interest.

Jan 23 101. Memorandum

Jan 23 102. Order that Defendant's Motion to Dismiss is denied.

Jan 23 103. Defendant's Motion for Judgment n/o/v or for New Trial.

Jan 26 104. Defendant's Amended Motion for New Trial.

Feb 5 105. Defendant's Brief in Support of Motion for Judgment NOV and Motion for New Trial.

Feb 6 106. Memorandum.

Feb 6 107. Order that defendant's Motion for New Trial or Judgment n/o/v is denied.

Feb 26 108. Defendant's Notice of Appeal.

Feb 26 109. Defendant's Motion for Stay of Execution of

Judgment and Approval of Supersedeas Bond.

Feb 26 110. Order that amount of Supersedeas Bond be filed in the sum of $250,000.00, etc.

Feb 26 111. Defendant's Supersedeas Bond.

Feb 26 112. Defendant's Praecipe for Transcript of Proceedings.

Feb 26 113. Defendant's Praecipe for Record on Appeal, etc.

Feb 26 114. Defendant's Amended Notice of Appeal.

The opinion of the Court of Appeals is reported at 558 Fed. 2d 432 (8th Cir. 1977) and can be found in the Appendix to the Petition for Certiorari at App. pp. 1-36.

The Order Denying Petition for Rehearing En Banc by an evenly divided Court is unreported and appears in Appendix B to the Petition for Certiorari at App. p. 37.

COMPLAINT

(Filed November 24, 1972)

Plaintiff alleges:

I.

That she is a citizen and resident of Carter Lake, Pottawattamie County, Iowa, and that she was duly appointed as administratrix of the Estate of James D. Kroger, deceased, by the District Court in and for Pottawattamie County, Iowa; said appointment being duly made on October 25, 1972.

II.

That the defendant, Omaha Public Power District, a public corporation, is a public corporation organized and existing under the laws of the State of Nebraska and having its principal place of business in Omaha, Douglas County, Nebraska.

III.

That the defendant, Paxton & Vierling Steel Company, is a Nebraska corporation and is made a party defendant herein for the sole and only purpose of determining its rights under the Workmen's Compensation Act, if any, with respect to payments made under said Act to the plaintiff herein as next of kin of the deceased James D. Kroger.

IV.

That the amount in controversy exceeds the sum of $10,000.00 exclusive of interest and costs.

V.

That on January 18, 1972, plaintiff's decedent was employed and working in the capacity of a machinist for the defendant, Paxton & Vierling Steel Company at its place of business in Carter Lake, Iowa, and as such was lawfully on the premises of the Paxton & Vierling Steel Company and in the vicinity of a high tension electric transmission line installed and maintained by the defendant, Omaha Public Power District in the course of its operation of an electric light and power distributing system and that said defendant, Omaha Public Power District, maintained a high tension electric transmission line across the premises of Paxton & Vierling Steel Company.

VI.

That at said date and place, plaintiff's decedent was working near a tank suspended by a cable attached to the boom of a crane and that as a result of the negligent maintenance and placement of the said high tension electric transmission line, said boom cable and tank became energized with electric current from said electric transmission line which resulted in a dangerous current of electricity of high voltage passing into and through the body of plaintiff's decedent and into the ground directly causing the death of plaintiff's decedent.

VII.

That the defendant, Omaha Public Power District, a public corporation, was negligent in the construction, maintenance and operation of said power transmission line in the following particulars:

(a) In not maintaining sufficient clearance between said lines and machinery reasonably expected to be operating in the vicinity of said lines.

(b) In not properly grounding and protecting said overhead lines.

(c) In not having said lines carrying said current properly insulated.

(d) In failing to warn plaintiff's decedent of the danger to which he was subjected.

(e) In failing to construct, maintain and operate said transmission lines in conformity with accepted standard of care and prudence observed in the industry and required by the laws of the State of Iowa.

(f) In allowing its highly dangerous product, to wit: high voltages of electricity, to escape and cause injury and death to plaintiff's decedent, in violation of and contrary to Section 489.16 of the Code of Laws of the State of Iowa.

VIII.

That the aforesaid negligence of Omaha Public Power District was the proximate cause of the death of plaintiff's decedent.

IX.

That plaintiff's decedent, at the time of his death, was 28 years of age with a life expectancy of 43.08 years, was earning and capable of earning in excess of $9,000.00 per year and was the sole support of plaintiff and four minor children.

X.

That prior to his death, plaintiff's decedent suffered extreme mental and physical pain and anguish because of the aforesaid negligence of defendant, Omaha Public Power District.

XI.

That the defendant, Omaha Public Power District had, prior to the electrocution of plaintiff's decedent, experienced other and many similar accidents in connection with uninsulated high voltage electric transmission lines throughout its system and knew for many years prior to January 18, 1972, that the continuance of said lines in said condition, in areas where persons could be expected to be injured thereby, was a dangerous and continuing practice and that the said defendant knowingly and willfully, wantonly, recklessly and grossly negligently disregarded the safety of others who might be expected to be injured or killed by such conduct and accordingly, in addition to the actual damages herein set out, plaintiff is entitled to an award of exemplary damages because of defendant, Omaha Public Power District's conduct aforesaid.

XII.

That by reason of the death of plaintiff's decedent, his said estate was damages in the amount of $750,000.00.

WHEREFORE, plaintiff demands judgment against the defendant, Omaha Public Power District, for $750,000.00 actual damages and $500,000.00 exemplary damages or an aggregate of $1,250,000.00, together with the costs of this action.

GERALDINE KROGER,
Administratrix of the Estate
of JAMES D. KROGER,
Deceased, Plaintiff

By: /s/ Warren C. Schrempp
SCHREMPP & BRUCKNER

1600 Woodmen Tower
Omaha, Nebraska 68102
Telephone (402) 341-1806
Attorneys for Plaintiff

THIRD PARTY COMPLAINT

(Filed August 24, 1973)

Comes now the Defendant and Third Party Plaintiff, Omaha Public Power District, and for its claim against the Third-Party Defendants, alleges and states as follows:

I.

Plaintiff, Geraldine Kroger, has filed against Defendant, Omaha Public Power District, a Complaint, a copy of which is attached hereto as "Exhibit A".

II.

The electrical power lines which Plaintiff alleges contributed to Plaintiff's decedent's death and injuries, were not owned, operated, or maintained by the Defendant and Third-Party Plaintiff, but were owned, operated and maintained by Third-Party Defendant, Paxton & Vierling Steel Co., which firm purchased said electrical power lines and all related poles, equipment and appurtenances on April 14, 1966. A true and correct copy of the bill of sale for said items is attached hereto as "Exhibit B".

By reason of said Third-Party Defendant's purchase of said electrical power lines, related equipment and appurtenances, any duty arising from the nature of their use or activities conducted in their vicinity, to maintain sufficient clearance, or otherwise protect, ground, or insulate such line, or to give warning as to their presence, or any other duty incident to the maintenance and ownership of said electrical power lines and apprutenances, falls solely

and entirely upon the owner and exclusive possessor of said electrical power lines and appurtenances, to wit, Third-Party Defendant, Paxton & Vierling Steel Company, and any liability arising out of a failure to operate or otherwise maintain said electrical power lines and appurtenances in a safe and careful manner in accordance with such duties is the sole responsibility and liability of Paxton & Vierling Steel Company.

III.

The alleged death and injuries of Plaintiff's decedent were solely and proximately caused by the negligence of Third-Party Defendant, Paxton & Vierling Steel Co., in the following particulars, to-wit:

(a) In failing to maintain sufficient clearance between said overhead electrical power lines and machinery reasonably expected to be operating in the vicinity of said power lines.

(b) In not properly grounding and protecting said overhead electrical power lines.

(c) In not having said overhead electrical power lines properly insulated.

(d) In failing to warn Plaintiff's decedent of the presence of said overhead electrical power lines.

(e) In failing to request the discontinuance of the electrical current through said overhead electrical power lines during the time that machinery was being operated, and men were working, in the vicinity of said lines.

(f) In failing to notify Third-Party Plaintiff that machinery was being operated, and that men were working in the vicinity of said overhead electrical power lines.

(g) In failing to comply with and being in violation of Section 88.4 of the Code of Laws of the State of Iowa, and the Federal Occupational Safety and

Health Act, 29 U. S. C. § 666, and specifically 29 C. F. R. § 1910.180, promulgated pursuant to said Act, in that said Third-Party Defendant failed to furnish a safe place of employment to its employees, free from recognized hazards likely to cause death or serious physical harm to an employee.

(h) In failing to comply with and being in violation of 29 U. S. C. § 651 and 29 C. F. R. § 1910.180 (d) (4); § 1910.180 (j) (1), (2), (3), and (4); and 29 C. F. R. § 1910.176 (e), as promulgated pursuant to the Federal Occupational Safety and Health Act, in failing to de-energize the said overhead electrical power lines; in permitting a crane to be operated within ten feet of an overhead electrical power line rated at over 50 KV; in failing to have cage-type boom guards, insulating lines, or proximity warning devices, on a crane being operated near an overhead electrical power line; in failing to notify the Third-Party Plaintiff before operating a crane near an overhead electrical power line; and in failing to determine if the said line was de-energized.

IV.

The crane alleged in Plaintiff's Complaint, was owned by Third-Party Defendant, Owen Construction Co., Inc., and was in no way owned, operated or maintained by the Third-Party Plaintiff.

Any duty arising out of the use of said crane in the vicinity of the overhead electrical power line owned by Third-Party Defendant, Paxton & Vierling Steel Co., to maintain sufficient clearance, sufficient grounding, insulating and safety devices on said crane, to instruct the operator as to proper safety precautions when in the vicinity of electrical power lines, and to give warnings of the presence of such lines near said crane, fall solely and entirely upon the owner of the crane, to-wit, Third Party Defendant, Owen Construction Co., Inc., and any liability arising out of a failure to operate or otherwise safely maintain said crane in accordance with such duties is the sole responsibility and liability of Third-Party Defendant, Owen Construction Co., Inc.

V.

The alleged death and injuries of Plaintiff's decedent were proximately caused and contributed to by the negligence of Third-Party Defendant, Owen Constructtion Co., Inc., in the particulars set forth in Paragraphs III (d); (e); (f); (g); and (h) of this Third-Party Complaint, which particulars are made a part of this Paragraph to the same extent as if fully repeated herein.

VI.

Based upon the foregoing allegations Third-Party Defendants, Paxton & Vierling Steel Co. and Owen Construction Co., Inc., are jointly and severally liable to Third-Party Plaintiff for any and all sums which Plaintiff may recover from said Defendant and Third-Party Plaintiff on her Complaint.

WHEREFORE, Defendant and Third-Party Plaintiff, Omaha Public Power District, demands judgement, jointly and severally, against the Third-Party Defendants, Paxton & Vierling Steel Co., and Owen Construction Co., Inc., for all sums that may be adjudged against the said Defendant and Third-Party Plaintiff in favor of Plaintiff, Geraldine Kroger, and for all costs herein expended by said Third-Party Plaintiff.

OMAHA PUBLIC POWER
DISTRICT,
A Public Corporation,
Defendant and
Third-Party Plaintiff

By: /s/ Robert G. Fraser and
D. R. Busick
of FRASER, STRYKER,
MARSHALL & VEACH,
P. C.

500 Electric Building
(Phone 341-6101)
Omaha, Nebraska 68102

Its Attorneys

VOLUNTARY MOTION TO DISMISS

(Filed September 7, 1973)

Comes now the Defendant and Third-Party Plaintiff, Omaha Public Power District, and voluntarily moves the Court to dismiss its claim against Third-Party Defendant, Owen Construction Co., Inc., and to permit the said Defendant and Third-Party Plaintiff to file an amended Third-Party Complaint naming Owen Equipment and Erection Co., as a Third-Party Defendant, for the following reasons:

The Defendant and Third-Party Plaintiff's attorney was misinformed as to the name of the appropriate defendant, when the original Third-Party Complaint was prepared and filed herein. Based upon new information obtained by said attorney, it is now known that Owen Euipment and Erection Co., is the party which should have been named rather than Owen Construction Co., Inc., and the latter corporation is in no way involved in the present proceeding.

Accordingly, the Defendant and Third-Party Plaintiff, Omaha Public Power District, respectfully moves the Court for an order dismissing Owen Construction Co., from this action, and granting said Defendant and Third-Party Plaintiff leave to file an amended Third-Party Complaint

naming Owen Equipment and Erection Co., as an additional Third-Party Defendant.

Respectfully submitted,

OMAHA PUBLIC POWER
DISTRICT,
Defendant and Third-Party
Plaintiff,

By /s/ R. G. Fraser &
D. R. Busik
Of Fraser, Stryker, Marshall & Veach, P. C.

500 Electric Building
Omaha, Nebraska 68102

Its Attorneys

ORDER

(Filed September 7, 1973)

This matter comes before the Court upon the motion of Omaha Public Power District, Defendant and Third-Party Plaintiff, for an order permitting it to voluntarily dismiss its action against Owen Construction Co., Inc., an Iowa Corporation, and to file an Amended Third-Party Complaint naming Owen Equipment and Erection Co., a Nebraska corporation, as an additional third-party defendant. The Court being fully advised in these premises finds the motion should be sustained. Accordingly,

IT IS ORDERED that Third-Party Defendant, Owen Construction Co., Inc., an Iowa corporation, should be and is hereby dismissed from this action, with prejudice.

IT IS FURTHER ORDERED that the Defendant and Third-Party Plaintiff should be and is hereby granted permission to file an Amended Third-Party Complaint

naming Owen Equipment and Erection Co., a Nebraska corporation, as an additional Third-Party Defendant in this action.

Dated this 7th day of September, 1973.

BY THE COURT:

/s/ Robert V. Denney
United States District Judge

AMENDED THIRD PARTY COMPLAINT

(Filed September 11, 1973)

Comes now the Defendant and Third-Party Plaintiff, Omaha Public Power District, and for its claim against the Third-Party Defendants, alleges and states as follows:

I.

Plaintiff, Geraldine Kroger, has filed against Defendant, Omaha Public Power District, a Complaint, a copy of which is attached hereto as "Exhibit A".

II.

The electrical power lines which Plaintiff alleges contributed to Plaintiff's decedent's death and injuries, were not owned, operated, or maintained by the Defendant and Third-Party Plaintiff, but were owned, operated and maintained by Third-Party Defendant, Paxton & Vierling Steel Co., which firm purchased said electirical power lines and all related poles, equipment and appurtenances on April 14, 1966. A true nd correct copy of the bill of sale for said items is attached hereto as "Exhibit B".

By reason of said Third-Party Defendant's purchase of said electrical power lines, related equipment and appurtenances, any duty arising from the nature of their use or activities conducted in their vicinity, to maintain sufficient clearance, or otherwise protect, ground, or insulate

such line, or to give warning as to their presence, or any other duty incident to the maintenance and ownership of said electrical power lines and appurtenances, falls solely and entirely upon the owner and exclusive possessor of said electrical power lines and appurtenances, to-wit, Third-Party Defendant, Paxton & Vierling Steel Company, and any liability arising out of a failure to operate or otherwise maintain said electrical power lines and appurtenances in a safe and careful manner in accordance with such duties is the sole responsibility and liability of Paxton & Vierling Steel Company.

III.

The alleged death and injuries of Plaintiff's decedent were solely and proximately caused by the negligence of Third-Party Defendant, Paxton & Vierling Steel Co., in the following particulars, to-wit:

(a) In failing to maintain sufficient clearance between said overhead electrical power lines and machinery reasonably expected to be operating in the vicinity of said power lines.

(b) In not properly grounding and protecting said overhead electrical power lines.

(c) In not having said overhead electrical power lines properly insulated.

(d) In failing to warn Plaintiff's decedent of the presence of said overhead electrical power lines.

(e) In failing to request the discontinuance of the electrical current through said overhead electrical power lines during the time that machinery was being operated, and men were working, in the vicinity of said lines.

(f) In failing to notify Third-Party Plaintiff that machinery was being operated, and that men were working in the vicinity of said overhead electrical power lines.

(g) In failing to comply with and being in violation of Section 88.4 of the Code of Laws of the State of Iowa, and the Federal Occupational Safety and Health Act, 29 U. S. C. § 666, and specifically 29 C. F. R. § 1910.180, promulgated pursuant to said Act, in that said Third-Party Defendant failed to furnish a safe place of employment to its employees, free from recognized hazards likely to cause death or serious physical harm to an employee.

(h) In failing to comply with and being in violation of 29 U. S. C. § 651 and 29 C. F. R. § 1910.180 (d) (4); § 1910.180 (j) (1), (2), (3); and (4); and 29 C. F. R. § 1910.176(e), as promulgated pursuant to the Federal Occupational Safety and Health Act, in failing to de-energize the said overhead electrical power lines; in permitting a crane to be operated within ten feet of an overhead electrical power line rated at over 50 KV; in failing to have cage-type boom guards, insulating lines, or proximity warning devices, on a crane being operated near an overhead electrical power line; in failing to notify the Third-Party Plaintiff before operating a crane near an overhead electrical power line; and in failing to determine if the said line was de-energized.

IV.

The crane alleged in Plaintiff's Complaint, was owned by Third-Party Defendant, Owen Equipment and Erection Co., a Nebraska corporation, and was in no way owned, operated or maintained by the Third-Party Plaintiff.

Any duty arising out of the use of said crane in the vicinity of the overhead electrical power line owned by Third-Party Defendant, Paxton & Vierling Steel Co., to maintain sufficient clearance, sufficient grounding, insulating and safety devices on said crane, to instruct the operator as to proper safety precautions when in the vicinity of electrical power lines, and to give warnings of the presence of such lines near said crane, falls solely and entirely upon the owner of the crane, to-wit, Third-Party Defendant, Owen Equipment and Erection Co., and any liability arising out of a failure to operate or otherwise safely maintain said crane in accordance with such duties is the sole responsibility and liability of Third-Party Defendant, Owen Equipment and Erection Co.

V.

The alleged death and injuries of Plaintiff's decedent were proximately caused and contributed to by the negligence of Third-Party Defendant, Owen Equipment and Erection Co., in the particulars set forth in Paragraphs III (d); (e); (f); (g); and (h) of this Amended Third-Party Complaint, which particulars are made a part of this Paragraph to the same extent as if fully repeated herein.

VI.

Based upon the foregoing allegations Third-Party Defendants, Paxton & Vierling Steel Co., and Owen Equipment and Erection Co., are jointly and severally liable to Third-Party Plaintiff for any and all sums which Plaintiff may recover from said Defendant and Third-Party Plaintiff on her Complaint.

WHEREFORE, Defendant and Third-Party Plaintiff, Omaha Public Power District, demands judgment, jointly and severally, against the Third-Party Defendants, Paxton & Vierling Steel Co., and Owen Equipment and Erection Co., for all sums that may be adjudged against the said Defendant and Third-Party Plaintiff in favor of Plaintiff, Geraldine Kroger, and for all costs herein expended by said Third-Party Plaintiff.

OMAHA PUBLIC POWER DISTRICT,
A Public Corporation,
Defendant and Third-Party Plaintiff

By /s/ R. G. Fraser &
D. R. Busick
Of Fraser, Stryker, Marshall &
Veach, P.C.
500 Electric Building
Omaha, Nebraska 68102
Its Attorneys

MOTION TO DISMISS BY
PAXTON & VIERLING STEEL CO.

(Filed September 24, 1973)

Comes now the third-party defendant, Paxton & Vierling Steel Co., a Nebraska corporation, and moves that the Third-Party Complaint be dismissed for the reason that it fails to state a claim upon which relief can be granted.

PAXTON & VIERLING
STEEL CO., A Nebraska
Corporation, Third-Party
Defendant,
By /s/ Ronald H. Stave
200 Century Professional
Plaza
7000 Spring Street
Omaha, Nebraska 68106
One of Its Attorneys

MOTION

(Filed September 28, 1973)

COMES NOW the plaintiff in the above entitled matter and pursuant to Rule 21 of the Federal Rules of Civil

Procedure, moves the Court for an order allowing the plaintiff to add as a party defendant Owen Equipment and Erection Co., a Nebraska Corporation.

GERALDINE KROGER,
Administratrix of the Estate of
JAMES D. KROGER, Deceased,
Plaintiff
By: /s/ Richard J. Dinsmore
SCHREMPP, BRUCKNER
& DINSMORE
1600 Woodmen Tower
Omaha, Nebraska 68102

ANSWER OF OWEN EQUIPMENT AND ERECTION COMPANY, THIRD-PARTY DEFENDANT

(Filed October 15, 1973)

Comes now the third-party defendant, Owen Equipment and Erection Company, and in answer to the Third-Party Complaint of Omaha Public Power District against it alleges, states and denies as follows:

1. Admits that Owen Equipment and Erection Company is a corporation organized and existing under the laws of the State of Nebraska.

2. Denies each and every other allegation contained in said Third-Party Complaint except those allegations which would be in the nature of admissions against the interest of the third-party plaintiff.

WHEREFORE, having fully answered the Third-Party Complaint of Omaha Public Power District filed herein, this third-party defendant respectfully prays that said Third-Party Complaint be dismissed as to this third-party defendant and that it have and recover its costs herein expended.

OWEN EQUIPMENT AND ERECTION COMPANY, A Corporation, Third-Party Defendant,

By: /s/ Ronald H. Stave

200 Century Professional Plaza
7000 Spring Street
Omaha, Nebraska 68106

One of Its Attorneys

MOTION FOR SUMMARY JUDGMENT

(Filed October 30, 1973)

Comes now the Defendant and Third-Party Plaintiff, Omaha Public Power District, and pursuant to Rule 56(a) of the Federal Rules of Civil Procedure moves the Court for an Order granting a summary judgment in favor of said movant on Plaintiff's Complaint, on the ground that there is no genuine issue as to any material fact, and said movant is entitled to a judgment as a matter of law.

In support of this motion, said Defendant relies upon the record herein, including all pleadings and answers to interrogatories, and such additional depositions or affidavits as may be introduced at the hearing on this motion.

OMAHA PUBLIC POWER DISTRICT, A Public Corporation, Defendant and Third-Party Plaintiff,

By /s/ D. R. Busick

Of Fraser, Stryker, Veach, Vaughn & Meusey,

500 Electric Building
Omaha, Nebraska 68102

MEMORANDUM AND ORDER

(Filed November 7, 1973)

Appearances:

For Plaintiff—Richard J. Dinsmore, of Omaha, Nebraska.

For Defendant and Third-Party Plaintiff—D. R. Busick, of Omaha, Nebraska.

For Third-Party Defendants—Ronald H. Stave, of Omaha, Nebraska.

This matter is before the Court on motion by third-party defendant, Paxton & Vierling, to dismiss [Filing No. 27] and plaintiff's motion to join a party [Filing No. 28].

In support of its motion to dismiss, Paxton & Vierling relies on *Mahue v. Iowa-Illinois Telephone Co.*, 279 F. Supp. 401, 403 (1967), which states:

> Under Iowa law which is applicable in this case wherein jurisdiction is based on diversity of citizenship, indemnity may be properly recovered against a concurrent tort-feasor when the claim for indemnity is founded upon (1) an express contract, (2) vicarious liability, (3) an independent duty running from the indemnitor to the indemnitee, or (4) active or primary negligence by the indemnitor as compared to passive or secondary negligence of the indemnitee. *Iowa Power and Light Co. v. Abild Construction Co.*, 144 N. W. 2d 303, (Ia. 1966) (citing cases). In *Abild*, the Iowa Supreme Court points out that of the four enumerated grounds for indemnification, the first three are based upon a relationship existing between the indemnitor and indemnitee. The fourth enumerated ground for indemnity (active or primary negligences v. passive or secondary negligence) is based only on common liability arising out of concurrent negligence (of different degrees) and is barred by the

> Iowa Workmen's Compensation Act, Iowa Code § 85.03, 85.20 (1962), in cases where the party from whom identification is sought has compensated the plaintiff under said act.

The Court agrees with Paxton & Vierling's statement of the law in this matter, but disagrees with the application of that law to the well pleaded allegations of the third party complaint. Paxton & Vierling has read the complaint too narrowly. The standard to be applied in ruling on a motion to dismiss a complaint for failure to state a cause of action is cited in 2A Moore's federal Practice ¶ 12.08, pp. 2271-2274, as follows:

> But a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.

Omaha Public Power District has alleged in Paragraph III, subparagraph (e), of its amended third-party complaint that Paxton & Vierling was negligent "In failing to request the discontinuance of the electrical current through said overhead electrical power lines during the time that machinery was being operated, and men were working in the vicinity of said lines."

Also, in Paragraph III, subparagraphs (f) and (h), of the amended third-party complaint allegations of failure to notify Omaha Public Power District are made. Accepting these allegations as fact, if Omaha Public Power District can prove a corresponding duty to inform Omaha Public Power District by Paxton & Vierling, the right of indemnity would be established. "Indemnity is permissible when the right arises out of a separate duty due the third party from the employer." *Iowa Power and Light Co. v. Abild Construction Co.*, 144 N. W. 2d 303, 309.

Considering next plaintiff's motion to join a party, Rule 21 of the Federal Rules of Civil Procedure gives the Court broad discretion in dropping or adding parties. In

exercising that discretion in this case, the Court finds that plaintiff's motion should be granted.

IT IS THEREFORE ORDERED THAT:

1. Paxton & Vierling's motion to dismiss is overruled; and

2. Plaintiff's motion to add a party is granted. Plaintiff will have until ten (10) days from the date of this order to file amended pleadings adding Owen Equipment and Erection Co. as a party defendant.

Dated this 7th day of November, 1973.

BY THE COURT

/s/ Robert V. Denney
United States District Judge

AMENDED COMPLAINT

(Filed November 9, 1973)

COMES NOW the plaintiff and for her Amended Complaint, alleges and states as follows:

I.

That she is a citizen and resident of Carter Lake, Pottawattamie County, Iowa and that she was duly appointed as administratrix of the Estate of James D. Kroger, deceased, by the District Court in and for Pottawattamie County, Iowa; said appointment being duly made on October 25, 1972.

II.

That the defendant, Omaha Public Power District, a public corporation, is a public corporation organized and existing under the laws of the State of Nebraska and having its principal place of business in Omaha, Douglas County, Nebraska; that the defendant, Owen Equipment

and Erection Co. is a Nebraska corporation with its principal place of business in Nebraska.

III.

That the amount in controversy exceeds the sum of $10,000.00 exclusive of interest and costs.

IV.

That on January 18, 1972, plaintiff's decedent was employed and working in the capacity of a machinist for Paxton & Vierling Steel Company at its place of business in Carter Lake, Iowa, and as such was lawfully on the premises of the Paxton & Vierling Steel Company and in the vicinity of a high tension electric transmission line installed and maintained by the defendant, Omaha Public Power District in the course of its operation of an electric light and power distributing system and that said defendant, Omaha Public Power District, maintained a high tension electric transmission line across the premises of Paxton & Vierling Steel Company.

V.

That at said date and place, plaintiff's decedent was working near a tank suspended by a cable attached to the boom of a crane and that as a result of the negligent maintenance and placement of the said high tension electric transmission line, said boom cable and tank became energized with electric current from said electric transmission line which resulted in a dangerous current of electricity of high voltage passing into and through the body of plaintiff's decedent and into the ground directly causing the death of plaintiff's decedent.

VI.

That the defendant, Omaha Public Power District, a public corporation, was negligent in the construction, maintenance and operating of said power transmission line in the following particulars:

(a) In not maintaining sufficient clearance between said lines and machinery reasonably expected to be operating in the vicinity of said lines.

(b) In not properly grounding and protecting said overhead lines.

(c) In not having said lines carrying said current properly insulated.

(d) In failing to warn plaintiff's decedent of the danger to which he was subjected.

(e) In failing to construct, maintain and operate said transmission lines in conformity with accepted standards of care and prudence observed in the industry and required by the laws of the State of Iowa.

(f) In allowing its highly dangerous product, to-wit: high voltages of electricity, to escape and cause injury and death to plaintiff's decedent, in violation of and contrary to Section 489.16 of the Code of Laws of the State of Iowa.

VII.

That the crane was owned by the defendant, Owen Equipment and Erection Co.; that the defendant, Owen Equipment and Erection Co., was negligent and such negligence, together with the negligence of the defendant, Omaha Public Power District, as heretofore set forth, was the proximate cause of the death and injury of plaintiff's decedent in the following particulars, to-wit:

(a) In failing to warn plaintiff's decedent of the presence of said overhead electrical power lines.

(b) In failing to request the discontinuance of the electrical current through said overhead electrical power lines during the time that machinery was being operated, and men were working, in the vicinity of said lines.

(c) In failing to notify Third-Party plaintiff that machinery was being operated, and that men were working in the vicinity of said overhead electrical power lines.

(d) In failing to comply with and being in violation of Section 88.4 of the Code of Laws of the State of Iowa, and the Federal Occupational Safety and Health Act, U. S. C. § 666, and specifically 29 C. F. R. § 1910.180, promulgated pursuant to said Act, in that said Third-Party defendant failed to furnish a safe place of employment to its employees, free from recognized hazards likely to cause death or serious physical harm to an employee.

(e) In failing to comply with and being in violation of 29 U. S. C. § 651 and 29 C. F. R. § 1910.180 (d) (4); § 1910.180 (j) (1), (2), (3) and (4); and 29 C. F. R. § 1910.176 (e), as promulgated pursuant to the Federal Occupational Safety and Health Act, in failing to de-energize the said overhead electrical power lines; in permitting a crane to be operated within ten feet of an overhead electrical power line rated at over 50 KV; in failing to have cage-type boom guards, insulating lines, or proximity warning devices on a crane being operated near an overhead electrical power line; in failing to notify the Third-Party plaintiff before operating a crane near an overhead electrical power line; and in failing to determine if the said line was de-energized.

Based upon the foregoing allegations, defendants, Omaha Public Power District and Owen Equipment and Erection Co., are jointly and severally liable to the plaintiff.

VIII.

That plaintiff's decedent, at the time of his death, was 28 years of age with a life expectancy of 43.08 years, was

earning and capable of earning in excess of $8,000.00 per year and was the sole support of plaintiff and four minor children.

IX.

That prior to his death, plaintiff's decedent suffered extreme mental and physical pain and anguish because of the aforesaid negligence of the defendants.

X.

That the defendants, Omaha Public Power District and Owen Equipment and Erection Co., had, prior to the electrocution of plaintiff's decedent, experienced other and many similar accidents in connection with uninsulated high voltage electric transmission lines throughout its system and knew for many years prior to January 18, 1972 that the continuance of said lines in said condition, in areas where persons could be expected to be injured thereby, was a dangerous and continuing practice and that the said defendants knowingly and willfully, wantonly, recklessly and grossly negligently disregarded the safety of others who might be expected to be injured or killed by such conduct and accordingly, in addition to the actual damages herein set out, plaintiff is entitled to an award of exemplary damages because of defendants, Omaha Public Power Di: ict's and Owen Equipment and Erection Co's conduct aforesaid.

XI.

That by reason of the death of plaintiff's decedent, his said estate was damaged in the amount of $750,000.00.

WHEREFORE, Plaintiff demands judgment against the defendants, and each of them, for $750,000.00 actual damages and $500,000.00 exemplary damages or an aggregate of $1,250,000.00, together with the costs of this action.

GERALDINE KROGER,
Administratrix of the Estate of
JAMES D. KROGER, Deceased,
Plaintiff

By: /s/ Richard J. Dinsmore

SCHREMPP, BRUCKNER
& DINSMORE

1600 Woodmen Tower
Omaha, Nebraska 68102

ANSWER TO AMENDED COMPLAINT

(Filed November 27, 1973)

Comes now the third-party defendant, Owen Equipment and Erection Company, and in Answer to the Amended Complaint of the plaintiff alleges, states and denies as follows:

1. Admits that Owen Equipment and Erection Company is a corporation organized and existing under the Laws of the State of Nebraska.

2. Denies each and every other allegation contained in said Amended Complaint, except those allegations which would be in the nature of admissions against the interest of the plaintiff.

WHEREFORE, having fully answered the Amended Complaint of the plaintiff, this third-party defendant respectfully prays that said Amended Complaint be dismissed as to this third-party defendant and that it have and recover its costs herein expended.

OWEN EQUIPMENT AND
ERECTION COMPANY, A
Corporation, Third-Party
Defendant,

By /s/ David A. Johnson

200 Century Professional
Plaza

7000 Spring Street
Omaha, Nebraska 68106

One of Its Attorneys

ANSWERS TO REQUEST FOR ADMISSIONS

(Filed November 27, 1973)

Comes now the third-party deefndant, Paxton & Vierling Steel Co., a Nebraska Corporation, and for its Answers to the Request for Admissions of third-party plaintiff, Omaha Public Power District, states as follows:

1. Paxton & Vierling Steel Co., owns all of the electrical distribution equipment, fixtures and related wires and poles located on the premises of its steel plant at 423 Avenue "H", Carter Lake, Iowa.

ANSWER: Admitted.

2. Paxton & Vierling Steel Co., owns all of the property described in the Schedule of Material attached to Exhibit "B", a copy of which is attached hereto.

ANSWER: Admitted.

3. Exhibit "B", attached hereto, is a true and genuine copy of a bill of sale, whereby the Omaha Public Power District sold to Paxton & Vierling Steel Co. all of the electrical distribution equipment and fixtures described in the Schedule of Material attached to said exhibit, and that Paxton & Vierling Steel Co. acknowledged receipt of said material thereon on November 14, 1966.

ANSWER: Admitted.

4. The high tension electric transmission line referred to in Paragraph IV of plaintiff's Complaint was owned by Paxton & Vierling Steel Co., on January 18, 1972.

ANSWER: Admitted.

5. James D. Kroger, deceased, was employed by Paxton & Vierling Steel Co., on January 18, 1972.

ANSWER: Admitted.

6. Paxton & Vierling Steel Co. did not notify the Omaha Public Power District that a crane was being operated near the electrical transmission line referred to in Paragraph V of plaintiff's Complaint, on January 18, 1972, prior to the death of James D. Kroger.

ANSWER: Admitted.

7. Paxton & Vierling Steel Co. never requested the Omaha Public Power District to discontinue electrical transmission to its plant, located at 423 Avenue "H", Carter Lake, Iowa on January 18, 1972, prior to James D. Kroger's death.

ANSWER: Admitted.

8. The operator of the crane referred to in plaintiff's Complaint was an employee of Paxton & Vierling Steel Co.

ANSWER: Admitted.

PAXTON & VIERLING
STEEL CO., A Nebraska
Corporation, Third-Party
Defendant,

By: /s/ Lloyd L. Feller
Executive Vice-President

INTERROGATORIES

(Filed June 17, 1974)

To: Defendant and Third-Party Defendant, Owen Equipment and Erection Co., and its Attorney, David Johnson.

You are hereby notified to answer seperately and in writing, under oath, pursuant to Rule 33 of the Federal

Rules of Civil Procedure, within thirty (30) days of the date service is had upon you, the following interrogatories. You are further notified that these interrogatories are to be continuing, and should said Third-Party Defendant or its attorneys discover additional information as to matters inquired into in these interrogatories, between the time answers are made and the time of trial, supplemental answers shall be made informing the Third-Party Plaintiff and its attorneys as to any such information, duly discovered prior to trial.

1. Who owned the crane referred to in Plaintiff's complaint?

2. Who was operating the crane at the time of the accident alleged in Plaintiff's complaint and what is his present address?

3. Who was said operator employed by at the time of the accident?

4. Who is said operator employed by now?

5. Has said operator ever been employed by Owen Equipment and Erection Co.?

6. What kind of crane was involved in the accident alleged in Plaintiff's complaint?

7. Who manufactured the crane referred to in Plaintiff's complaint?

8. What year was said crane manufactured?

9. Was said crane equipped with a cage-type boom guard; insulating lines; proximity warning devices; or any other devices or equipment which would have either prevented electric current from traveling down the boom of the crane or would have warned the operator when the boom of the crane was in close proximity to an electrical transmission line?

10. Who maintained and serviced the crane?

11. Was the crane ever used at any location other than at Paxton & Vierling Steel Co., in Carter Lake, Iowa?

12. If the answer to Interrogatory No. 11 is affirmative, state each such location, the date or dates of use at each such location, and the name of the operator on each such occasion.

13. State the name of the liability insuraance carrier or carriers for Owen Equipment and Erection Co.

14. State the limits of the insurance coverage of each insurance policy owned by Owen Equipment and Erection Co., which may be applicable to this action?

OMAHA PUBLIC POWER DISTRICT,
A Public Corporation, Defendant and Third-Party Plaintiff,

By: /s/ D. R. Busick
Of Fraser, Stryker, Veach, Vaughn & Meusey, P.C.

500 Electric Building
Omaha, Nebraska 68102

Its Attorneys

ANSWERS TO INTERROGATORIES
(Filed July 13, 1974)

Comes now the third-party defendant, Owen Equipment and Erection Co., and for Answer to the Interrogatories propounded by defendant and third-party plaintiff, Omaha Public Power District, states as follows:

1. Who owned the crane referred to in plaintiff's complaint?

ANSWER: Owen Equipment and Erection Co.

2. Who was operating the crane at the time of the accident alleged in plaintiff's complaint and what is his present address?

ANSWER: David Morrow, 9607 Ohio Street, Omaha, Nebraska.

3. Who was said operator employed by at the time of the accident?

ANSWER: Paxton & Vierling Steel Co.

4. Who is said operator employed by now?

ANSWER: Paxton & Vierling Steel Co.

5. Has said operator ever been employed by Owen Equipment and Erection Co.?

ANSWER: Yes, Mr. Morrow has been employed by Owen Equipment and Erection Co. He was employed for that company for approximately two weeks from August 4, 1958 to August 16, 1958. An "oiler" is someone who works with a crane but does not operate it, and is sort of a handyman should something go wrong with the crane.

6. What kind of crane was involved in the accident alleged in plaintiff's complaint?

ANSWER: The records of Owen Equipment and Erection Co. reflect that the type of crane involved in the accident was a Lorain three-quarter yard crane, Model TL25, Serial No. 3980.

7. Who manufactured the crane referred to in plaintiff's complaint?

ANSWER: The records of Owen Equipment and Erection Co. would indicate that the manufacturer is Thew Shovel Company, Lorain, Ohio.

8. What year was said crane manufactured?

ANSWER: The records of Owen Equipment and Erection Co. would reflect that the crane was purchased in 1949; however, the actual date of manufacture is unknown to them.

9. Was said crane equipped with a cage-type boom guard; insulating lines; proximity warning devices; or any other devices or equipment which would have either prevented electric current from traveling down the boom of the crane or would have warned the operator when the boom of the crane was in close proximity to an electrical transmission line?

ANSWER: There were no such devices to our knowledge.

10. Who maintained and serviced the crane?

ANSWER: Everyday-type maintenance and service work on the crane was performed by David Morrow and Fred Kohler, Jr. However, any repairs needed to be done to the crane were performed by Missouri Valley Machinery Company.

11. Was the crane ever used at any location other than at Paxton & Vierling Steel Co., in Carter Lake, Iowa?

ANSWER: Yes.

12. If the answer to Interrogatory No. 11 is affirmative, state each such location, the date or dates of use at each such location, and the name of the operator on each such occasion.

ANSWER: In the first years when Owen Equipment and Erection Co. was active, a crane, not necessarily the crane in question, was used on numerous jobs outside of the present Paxton & Vierling Steel facilities. The last dated invoice of Owen Equipment and Erecetion Co. is dated December, 1963 for outside erection jobs. There is also an undated invoice for 1967; however, there were no cranes used outside of the Paxton & Vierling Steel Co.'s premises after 1967 as reflected by the records of this company.

13. State the name of the liability insurance carrier or carriers for Owen Equipment and Erection Co.

ANSWER: Great American Insurance Company.

14. State the limits of the insurance coverage of each insurance policy owned by Owen Equipment and Erection Co., which may be applicable to this action.

ANSWER: This information has been requested and will be furnished when this defendant is in receipt of same.

OWEN EQUIPMENT AND ERECTIO CO., a Nebraska Corporation, Defendant,

By: /s/ David A. Johnson

200 Century Professional Plaza
7000 Spring Street
Omaha, Nebraska 68106

One of Its Attorneys

MEMORANDUM AND ORDER

(Filed August 23, 1974)

This matter is before the Court on the motion by the defendant and third party plaintiff, Omaha Public Power District (hereafter referred to as OPPD), for summary judgment [Filing No. 30].

In support of its motion, the defendant, OPPD, cites several convincing cases which this Court believes accurately reflect the legal position of a producer and supplier of electricity which does not manifest the incidents of ownership, custody or control of the power lines in question. Due consideration having been given to all the pleadings filed in this case, the fruits of discovery, requests for admissions and the detailed depositions of individuals cognizant of all the elements of this incident, the Court is of the explicit opinion that there is not a significant substantial or genuine issue of fact as regards the alleged or potential liability of this sole defendant, OPPD.

The uncontroverted and abbreviated facts as regards this defendant expose a situation which denounces any liability on the part of OPPD. The Court is fully aware of the infrequent utilization of summary judgment in negligent actions. *Berry v. Atlantic Coast Line R. R.*, 273 F. 2d 572 (4th Cir. 1960). However, it finds in this case that reasonable men could not reach different conclusions

and inferences from the objectively developed and undisputed facts.

On January 18, 1972, the plaintiff's decedent was employed by Paxton & Vierling Steel Company and was working at its factory in Carter Lake, Iowa. While James Kroger was assisting in the movement of a large metal container suspended in the air by a crane, the crawler crane, while traversing across the premises of Paxton & Vierling Steel Company, contacted a high tension electric transmission line, owned and operated by Paxton & Vierling. The Court restrains itself exclusively to the negligence and duty which adheres in the Omaha Public Power District under the facts at this instant.

All the electrical distribution and transmission material and equipment on the premises of Paxton & Vierling's Carter Lake factory were owned by Paxton & Vierling at the time of this incident. OPPD did not have the obligation or duty to maintain these lines. Its sole relationship to Paxton & Vierling was the sale of electricity. Service calls made by OPPD at all times in response to requests of Paxton & Vierling were performed in the capacity of an independent contractor. At no time precedent to this incident did any individual or agent request OPPD to discontinue the flow of electricity to this factory on this day. OPPD was not advised nor put on notice that a crane crawler was being operated in the vicinity of these lines, nor was a service request made by Paxton & Vierling to OPPD to remove, raise or ground the subject power lines.

The plaintiff's claim against this defendant resides in the negligent maintenance and operation of specific transmission lines across the premises of Paxton & Vierling Steel Company. The crucial element in this allegation is the failure to show a possible breach of duty by OPPD to that class of individuals including this decedent, James Kroger.

OPINION

The pivotal fact in this case is the ownership and coincident responsibility for these specific powerlines. The Court is of the opinion that the lack of ownership and control of these lines demand that OPPD be severed from this action. 26 Am. Jur. 2d *Electricity, Gas and Steam* § 105, (1965), and cases cited therein. In most instances, a company which furnishes electric current for use in a system of poles, wires, or appliances owned and controlled by the purchaser of the power, is not under an obligation to inspect the carrying media before supplying the current and is not under a duty of continuing inspection while the current is being supplied. 26 Am. Jur. 2d *Electricity, Gas and Steam* § 106 (1966) and cases cited therein. *Merrit v. Tidewater Power Co.*, 205 N. C. 259, 171 S. E. 90 (1933); *Maynard v. Kentucky & West Virginia Power Co.*, 266 Ky. 295, 98 S. W. 2d 460 (1936).

The power lines in question were unequivocally sold to Paxton & Vierling Steel Company by OPPD in 1966. This Court notes the distinguishing characteristics in *Iowa Power & Light Co. v. Abild Construction Co.*, 144 N. W. 2d 303 (Iowa 1966), specifically on the burden and duty of "owning" an electrical distribution system and the inherent responsibilities thereof.

The Court acknowledges the plaintiff's contention that such a sale or transfer may be invalid or ultra vires. The Court recognizes, however, the overriding consideration that neither the custody and control of these lines resided in OPPD, nor did the title at the time of this incident. Paxton & Vierling admits ownership of these lines and the bill of sale was attached to the amended complaint. There is no merit in fact or law which supports the plaintiff's contention that the responsibility for these transmission lines still resided with OPPD. The failure of OPPD to obtain a franchise like that of the illegality of the contract under Iowa law is a matter strictly between the State of Iowa and OPPD; this failure does not enhance the position of the plaintiff because it is a defense

which, as a rule, cannot be invoked by a third party. *Armstrong v. Armstrong,* 192 Neb. 11, — N. W. 2d — (1974).

The case of *Berry v. Atlantic Coast Line Railroad, supra,* and the numerous decisions relying upon this foundational case dictate that summary judgment be granted to this defendant as a matter of law.

The undisputed facts reveal that the vertical distance between the wires and the ground was 33 feet. (Willis Long Deposition, 33:5-9). The requirement of Section 232 of the National Electric Safety Code requires a 20 feet clearance for this wire carrying 13,800 volts. (Willis Long Deposition, 15:7-9). This empirical fact meets the minimum requirement of the code. "It is difficult to conceive a better test of care than compliance with its provisions. *Smith v. Iowa Public Service Co.,* 233 Iowa 336, 6 N. W. 2d 123 (1942).

After being admonished about the danger of operating cranes near high voltage electrical lines (David Morrow Deposition, 177:13-18), the crane operator, an employee of Paxton & Vierling Steel Company, proceeded to raise the 60 foot boom upwards in the direction of the wires (Id., 185).

The *Berry* case is specifically dispositive on this point: "'. . . fraught with seemingly grave and obvious danger, while neglecting the equally practical alternatives which entailed no risk . . .'' (*Manaia v. Potomac Elec. Power Co.,* 4 Cir., 1959, 268 F. 2d 793, 798, cert. denied, 80 S. Ct. 255) was beyond the bounds of anything which the electric company might reasonably have anticipated." The Court also believes that this case dispels the plaintiff's remaining contentions based on OPPD's negligence due to the empirical fact that OPPD did not own these lines nor did it retain the incidents of ownership over these lines.

An order in compliance with this memorandum will be entered contemporaneously herewith.

Dated this 22nd day of August, 1974.

ORDER

(Filed August 23, 1974)

This matter comes before the Court on the motion of the defendant, Omaha Public Power District, for summary judgment. The Court finds that the defendant, OPPD, is not or was not chargeable with a duty owed to James Kroger for the persuasive reason that the control, ownership and responsibility for maintenance of these lines did not reside with the Omaha Public Power District. The plaintiff has failed to show that the defendant knew or reasonably could have known of a dangerous condition on the premises of Paxton & Vierling Steel Company.

IT IS THEREFORE ORDERED that this defendant, Omaha Public Power District, shall be granted its motion for summary judgment for the reasons stated in the memorandum filed contemporaneously herewith.

Dated this 22nd day of August, 1974.

BY THE COURT:

/s/ Robert V. Denney,
United States District Judge

MOTION FOR SUMMARY JUDGMENT

(Filed September 4, 1974)

Comes now the Defendant, Owen Equipment and Erection Co., a Nebraska Corporation, and pursuant to Rule 56 (a) of the Federal Rules of Civil Procedure moves the Court for an Order granting a summary judgment in favor of this defendant on plaintiff's Amended Complaint on the grounds that there is no genuine issue as to any material fact and that this defendant is entitled to a judgment as a matter of law.

In support of this motion, this defendant relies upon the record herein, including all pleadings and answers to

interrogatories, and depositions taken of various witnesses or affidavits as may be introduced at the hearing on this motion.

OWEN EQUIPMENT AND ERECTION CO., a Nebraska Corporation, Defendant

By /s/ David A. Johnson,

200 Century Professional Plaza,
7000 Spring Street,
Omaha, Nebraska 68106

One of Its Attorneys.

ORDER

(Filed February 12, 1975)

This matter comes before the Court pursuant to Rules 54 (b) and 60 (a) of the Federal Rules of Civil Procedure.

On August 23, 1974, an order of this Court was entered in the record of this case, granting Defendant, Omaha Public Power District's motion for summary judgment. It was the intent of this Court that said order be final and appealable, but it now appears that through clerical inadvertance and oversight said order was not in strict compliance with Rule 54 (b) of the Federal Rules of Civil Procedure, and that the Court now pursuant to Rule 60 (a) of the Federal Rules of Civil Procedure finds the following order should be entered. Accordingly,

IT IS ORDERED AND DIRECTED that a final judgment should be entered, on a separate document, dismissing the Defendant, Omaha Public Power District, from this action, with prejudice, and that costs be taxed to Plaintiff.

IT IS FURTHER ORDERED that there is no just reason for delay of the entry of such final judgment as to

said Defendant, nor any just reason to delay an appeal of such judgment.

Dated this 11th day of February, 1975.

BY THE COURT:

/s/ Robert V. Denney,
United States District Judge

JUDGMENT

(Filed February 12, 1975)

This matter came on for hearing before the Court, Honorable Robert V. Denney, District Judge presiding, on the motion for summary judgment of Defendant, Omaha Public Power District, and the issues having been duly heard and considered, and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that Plaintiff take nothing from the Defendant, Omaha Public Power District, that the action as to said Defendant be dismissed, with prejudice, on the merits, and that said Defendant recover of the Plaintiff its costs of the action.

Dated this 12th day of February, 1975.

/s/ Richard C. Peck,
Clerk of the Court

JUDGMENT

(Filed October 1, 1975)

Appeal from the United States District Court for the — District of Nebraska.

THIS CAUSE came on to be heard on the record from the United States District Court for the — District of Nebraska and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed:

September 9, 1975

Costs taxed in favor of Appellee:

Costs of printing 10 copies of Appellee's brief:	$221.51
Total costs of Appellee for recovery from Appellant in the U. S. District Court:	$221.51

Appellant's decedent was employed by Paxton & Vierling Steel Company at its factory in Carter Lake, Iowa. On January 18, 1972, decedent was involved in the movement of a large steel tank by means of a crane with a 60-foot boom. While one man drove the crane and another operated the boom, decedent walked along side the tank to steady it. During this maneuver, the boom came close enough to high-tension lines that electricity from those lines arced over to the boom. Another arc of electricity arced from the tank over to decedent and killed him.

Omaha Public Power District ["OPPD"], a public corporation of the state of Nebraska, had at one time owned the transmission lines involved. On November 14, 1966, however, OPPD sold the lines and equipment to Paxton & Vierling. OPPD thereafter sold electricity to Paxton & Vierling and when so requested made repairs upon the lines and equipment.

The District Court based its order of summary judgment on the fact that ownership of the transmission lines lay indisputably with Paxton & Vierling, that OPPD had no duty to maintain the lines, that OPPD had not been requested to discontinue the flow of electricity on the date of the accident and that OPPD had not been put on notice that a crane was being operated in the vicinity of the lines. As a result, there was no duty owed by OPPD to decedent, the breach of which would give rise to liability.

Summary judgment under Rule 56, Federal Rules of Civil Procedure, will not be granted unless "there is no genuine issue as to any material fact and * * * the moving party is entitled to a judgment as a matter of law." Rule 56 (c). Any inferences to be drawn from the facts must be viewed in the light most favorable to the party opposing the motion and should there be any reasonable doubt as to the existence of a genuine issue of a material fact, summary judgment must be denied. *Giordano v. Lee,* 434 F. 2d 1227 (8th Cir. 1970); *Clausen & Sons, Inc., v. Theo. Hamm Brewing Co.,* 395 F. 2d 388 (8th Cir. 1968); *Traylor v. Black, Sivalls & Bryson, Inc.,* 189 F. 2d 213 (8th Cir. 1951). Appellant cites *Williams v. Chick,* 373 F. 2d 330 (8th Cir. 1967), for the proposition that "a summary judgment does not provide a very satisfactory approach in tort cases." *Id.* at 332. Nonetheless, Rule 56 does not exclude tort claims, nor any other type of claims, from its provisions. While it is perhaps true that most tort cases would not be susceptible to a summary judgment, that is not to say that there are no claims sounding in tort which may be disposed of by means of a summary judgment.

A review of the applicable law leads this Court to the conclusion that the District Court was correct in granting summary judgment. *Cronk v. Iowa Power and Light Company,* 138 N. W. 2d 843 (Iowa 1966), sets forth the general law in this area:

> It is the duty of a person or corporation that maintains and controls wires or cables for the furnishing of electricity to others, to carefully and properly insulate their wires at all places where there is a likelihood or reasonable probability of human contact by persons who business or duty or rightful pursuit of mere diversion or pleasure brings them without contributory fault on their part into the zone of danger * * *.
>
> The law is well settled in this state that one furnishing electricity, while not an insurer, is held to the highest degree of care consistent with the conduct and operation of the business. The defendant had the

> duty to use reasonable care commensurate with the danger to prevent the escape of electricity from its line.

Id. at 847, 848. *See* also *Nelson v. Iowa-Illinois Gas and Electric Company,* 160 N. W. 2d 448 (Iowa 1968). In these cases however, there was no dispute as to the ownership of the lines; it lay with the power companies. In *LeCleve v. Iowa Electric Light and Power Co.,* 119 N. W. 2d 203 (Iowa 1963), the court refused to impose liability on the power company where the lines were privately owned and there was no showing of a duty to repair. In *Coleman v. Iowa Ry., Light & Power Co.,* 178 N. W. 365 (Iowa 1920), liability for wrongful death was placed on the power company even though the poles and lines belonged to decedent. The distinguishing factor was that liability was based on a breach of a duty of due care in the original construction of the lines and poles.

In the present case, ownership clearly lies with Paxton & Vierling. No claim is made that OPPD was negligent in the original construction of the lines. Liability, if any, must therefore be based on a breach of a duty to maintain or control the lines.

Iowa law is silent as to the conditions under which a non-owner will be said to have a duty to maintain or a right of control. Case law from other jurisdictions indicate that as a general rule a mere supplier of electricity cannot be held liable for injuries resulting from negligent maintenance of the lines and equipment. *White v. Orlando Utilities Comm'n,* 150 So. 2d 879 (Fla. App. 1963); *City of Decature v. Parham,* 109 So. 2d 692 (Ala. 1959); *Reichholdt v. Union Electric Co.,* 329 S. W. 2d 634 (Mo. 1959); *Hughes v. Louisiana Power & Light Co.,* 94 So. 2d 532 (La. App. 1956); *Louisville Gas & Electric Co. v. Johnson,* 282 S. W. 2d 138 (Ky. App. 1955); *Milligan v. Georgia Power Co.,* 22 S. E. 2d 662 (Ga. App. 1942). And the mere fact that the supplier was called in to make needed repairs does not impose a duty to maintain. *Bristol Gas & Electric Co. v. Deckard,* 110 F. 2d 66 (6th Cir. 1926);

Louisville Gas & Electric Co. v. Johnson, supra. Nor can it be said that OPPD had a right to control. To control means "to exercise restraining or directing influence over; to dominate; regulate • • • ." Webster's New International Dictionary (2d Ed. 1944). The facts show that OPPD did not hold such a position in relation to Paxton & Vierling's lines and equipment. The sale contract was absolute in its terms leaving OPPD without any incidence of control. The deposition of the president of Paxton & Vierling indicates that all control over the lines resided with Paxton & Vierling.

The facts also show clearly that OPPD did not know of the dangerous condition. OPPD was not told that a crane would be used near the power lines, nor were they requested to shut off the power. Under these circumstances there can be no liability for a failure to insulate the lines as appellant contends. Even the owner of transmission lines is not under an absolute duty to insulate. *Nelson v. Iowa-Illinois Gas and Electric Co., supra* at 452. *Cronk v. Iowa Power and Light Company, supra.* Such liability therefore cannot be imposed on a non-owner.

Appellant asserts that Ch. 489.16 of the Iowa Code creates a presumption in her favor. That section reads:

> In case of injury to any person or property by any such transmission line, negligence will be presumed on the part of the person or corporation operating said line in causing said injury but this presumption may be rebutted by proof.

Appellant contends that OPPD was operating the line and therefore the statutory presumption arises. It cannot be said, however, that a mere supplier of electricity operates the transmission lines within the meaning of that word. As used in the statute, operation implies a right of control or ownership over the l i n e s. Since OPPD neither owned nor controlled the lines, the presumption does not arise.

Appellant also states that OPPD did not comply with the laws of Iowa regulating the sale and distribution of

electricity. This assertion is irrelevant to the issue of whether OPPD owed a duty to decedent. In order for a violation of a statute to be evidence of negligence, it must be shown that statute was intended to create a duty of care owed to a class of persons of which decedent was a member. *Prosser, The Law of Torts,* § 36, p. 192 (4th ed. 1971). The Iowa statute regulating the sale and distribution of electricity is clearly not such a statute.

Liability for negligence cannot be imposed without first establishing that a duty was owed to decedent. *LeCleve v. Iowa Electric Power Co.,* 119 N. W. 2d 203 (Iowa 1963). As a matter of law, OPPD did not owe any duty to decedent under the circumstances of this case for the reason that OPPD did not own the transmission lines, nor did OPPD have a duty to maintain or a right of control over the lines involved.

For the foregoing reasons, judgment of the District Court is affirmed.

A true copy.

Attest: /s/ Robert C. Tucker
CLERK, U. S. COURT OF
APPEALS, EIGHTH
CIRCUIT.

ORDER

(Filed October 2, 1975)

This matter comes before the Court on motion of defendant (Filing No. 69) for summary judgment.

Pursuant to F. R. Civ. P. 56, this matter should be heard on oral argument.

IT IS THEREFORE ORDERED that defendant's motion come before the Court for oral argument at 9:30 A.M., on October 10, 1975, in Court Room No. 2, United States Post Office & Court House, Omaha, Nebraska.

Dated this 2nd day of October, 1975.

BY THE COURT

/s/ Robert V. Denney
United States District Judge

ORDER

(Filed November 14, 1975)

This matter comes before the Court on motion of defendant, Owen Equipment and Erection Company (hereinafter Owen) for summary judgment (Filing No. 69).

Owen contends that it was merely the owner of the crane involved in the death of plaintiff's decedent, and that as an owner it is not liable, as a matter of law, for the negligent use of the crane by employees of Paxton & Vierling Steel Company. In essence, Owen denominates itself a bailor or lessor of the crane; however, the plaintiff has rebutted this contention by citations to deposition testimony wherein questions are raised concerning the employment status of the two crane operators, Kohler and Morrow.

A review of the depositions, affidavits and interrogatories convinces the Court that there is a genuine issue of fact as to whether Kohler and Morrow were employed by the defendant or whether the crane was leased to Paxton & Vierling.

IT IS THEREFORE ORDERED that defendant's motion for summary judgment is denied.

Dated this 17th day of November, 1975.

BY THE COURT

/s/ Robert V. Denney
United States District Judge

ANSWER

(Filed January 13, 1976)

Comes now the defendant Owen Equipment and Erection Co., a Nebraska corporation, and for its Answer to the plaintiff's Amended Complaint admits, denies and alleges as follows:

I.

Defendant alleges that plaintiff's Amended Complaint fails to state a claim upon which relief can be granted.

II.

Defendant denies that the sum in controversy, exclusive of interest and costs, exceeds the sum of $10,000.00. Defendant denies that this Court has jurisdiction over the subject matter of this action and of the parties, plaintiff and defendant.

III.

Defendant denies that it was guilty of negligence in any of the particulars as set forth in plaintiff's Amended Complaint.

IV.

Defendant further alleges that plaintiff's decedent was guilty of contributory negligence sufficient to bar his recover as a matter of law.

V.

Defendant further alleges that plaintiff's decedent assumed the risk.

VI.

Defendant denies all other allegations contained in plaintiff's Amended Complaint, except those allegations which constitute admissions against the interest of the plaintiff.

WHEREFORE, this defendant having fully answered the Amended Complaint of the plaintiff prays that the same be dismissed and that it have and recover its costs herein expended.

OWEN EQUIPMENT AND ERECTION CO., A Nebraska Corporation, Defendant,

By /s/ David A. Johnson,

200 Century Professional Plaza,
7000 Spring Street,
Omaha, Nebraska 68106

One of Its Attorneys.

MOTION

(Filed January 15, 1976)

Comes now the defendant, Owen Equipment and Erection Co., and moves the Court for an order striking from the record in this action the entire opinion testimony of plaintiff's alleged expert witness, Samuel McMinn, for the reason that the questions and answers relative to Mr. McMinn's opinion were beyond the pleadings alleged in plaintiff's Amended Complaint which questions were objected to by this defendant, said objections and each of them being incorporated in this Motion and made a part hereof as if fully set forth herein. The scope of the questions asked of Mr. McMinn in eliciting his opinion were outside the scope of the plaintiff's allegations of negligence, thus creating prejudice to this defendant, surprise, and substantial injustice.

In addition to incorporating into this Motion by reference defendant's objections made at the time of the testimony of this witness, defendant also incorporates the remarks in support of those objections as set forth in the transcript of testimony in full as if fully set forth herein.

OWEN EQUIPMENT AND EREC-
TION CO., Defendant,

By /s/ David A. Johnson,

200 Century Professional Plaza,
7000 Spring Street,
Omaha, Nebraska 68106

One of Its Attorneys.

MOTION

(Filed January 15, 1976)

Comes now the defendant, Owen Equipment and Erection Co., and moves the Court for an order permitting this defendant to file an Answer to the plaintiff's Amended Complaint, the original of said Answer being attached to this Motion and made a part hereof.

The reasons submitted by defendant in support of this Motion have been orally set out in the record of this case at the time of trial before this Court.

OWEN EQUIPMENT AND EREC-
TION CO., Defendant,

By /s/ David A. Johnson,

200 Century Professional Plaza,
7000 Spring Street
Omaha, Nebraska 68106

One of Its Attorneys.

ANSWER

Comes now the defendant Owen Equipment and Erection Co., a Nebraska corporation, and for its Answer to the plaintiff's Amended Complaint admits, denies and alleges as follows:

I.

Defendant alleges that plaintiff's Amended Complaint fails to state a claim upon which relief can be granted.

II.

Defendant denies that the sum in controversy, exclusive of interest and costs, exceeds the sum of $10,000.00.

III.

Defendant denies that this Court has jurisdiction over the subject matter of this action and of the parties, plaintiff and defendant.

IV.

Defendant denies that it was guilty of negligence in any of the particulars as set forth in plaintiff's Amended Complaint.

V.

Defendant further alleges that plaintiff's decedent was guilty of contributory negligence sufficient to bar his recovery as a matter of law.

VI.

Defendant further alleges that plaintiff's decedent assumed the risk.

VII.

Defendant admits the allegation contained in plaintiff's Amended Complaint that Omaha Public Power District was negligent and that such negligence was the proximate cause of the injuries sustained by plaintiff's decedent.

VIII.

Defendant denies all other allegations contained in plaintiff's Amended Complaint, except those allegations which constitute admissions against the interest of the plaintiff.

WHEREFORE, this defendant having fully answered the Amended Complaint of the plaintiff prays that the same be dismissed and that it have and recover its costs herein expended.

OWEN EQUIPMENT AND ERECTION CO., a Nebraska Corporation, Defendant,

By /s/ David A. Johnson,

200 Century Professional Plaza,
7000 Spring Street
Omaha, Nebraska 68106

One of Its Attorneys.

MOTION FOR DISMISSAL,
OR IN THE ALTERNATIVE,
MOTION FOR DIRECTED VERDICT

(Filed January 15, 1976)

Comes now the defendant and moves the Court for an order dismissing this case, or in the alternative, for an order directing the jury to return a verdict in favor of this defendant for the following good and sufficient reasons:

1. Plaintiff's Amended Complaint fails to state a claim upon which relief can be granted to plaintiff.

2. This Court does not have jurisdiction over the subject matter of this action, or over the parties plaintiff and defendant.

3. That the evidence introduced by plaintiff, together with all reasonable inferences to be drawn therefrom, is insufficient as a matter of law to make a prima facie case against this defendant.

4. That the evidence offered by plaintiff, together with all reasonable inferences which may be drawn therefrom, shows no act of negligence on the part of this defendant.

5. That the evidence offered by the plaintiff shows that the plaintiff's decedent was guilty of contributory negligence sufficient to bar his recovery as a matter of law.

6. That the evidence offered by the plaintiff shows that the plaintiff's decedent assumed the risk and thus, plaintiff is precluded from recovering as a matter of law.

7. That there is no competent proof that the acts of this defendant were the proximate cause of the accident or of any of the plaintiff's alleged damages.

8. That there is no competent proof that plaintiff was damaged to any extent as alleged in her Amended Complaint.

OWEN EQUIPMENT AND ERECTION CO., a Nebraska Corporation, Defendant,

By /s/ David A. Johnson,

200 Century Professional Plaza,
7000 Spring Street
Omaha, Nebraska 68106

One of Its Attorneys.

VERDICT

(Filed January 16, 1976)

We, the Jury, find in favor of the Plaintiff and assess damages at the sum of Two hundred thirty-four thousand, Seven hundred fifty-six Dollars ($234,756.00).

Dated this 16th day of January, 1976.

Paul Beilenberg
Foreman

JUDGMENT

(Filed January 20, 1976)

This action came on for trial before the Court, and jury, Honorable ROBERT V. DENNEY, Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict;

IT IS ORDERED AND ADJUDGED:

That the plaintiff, GERALDINE KROGER, recover of the defendant, OWEN EQUIPMENT & ERECTION COMPANY, the sum of TWO HUNDRED THIRTY FOUR THOUSAND SEVEN HUNDRED AND FIFTY SIX DOLLARS ($234,756.00), with interest thereon at the rate of eight per cent per annum as provided by law, and taxable costs of this action.

Dated at Omaha, Nebraska, this 20th day of January, 1975.

WILLIAM L. OLSON, Clerk

By /s/ Robert E. Zielinski,
Deputy Clerk

MEMORANDUM

(Filed January 23, 1976)

APPEARANCES:

For Plaintiff—Richard J. Linsmore, of Omaha, Nebraska.

For Defendant—David A. Johnson, of Omaha, Nebraska.

DENNEY, District Judge

This matter comes before the Court upon the motion of defendant to dismiss for lack of subject matter jurisdiction and other reasons. The motion was presented to the

Court for the first time during the trial of the case at plaintiff's evidence.

Originally, plaintiff brought this suit against Paxton & Vierling Steel Company and Omaha Public Power District ([OPPD]. Paxton & Vierling was subsequently dismissed from the suit. Thereafter, OPPD filed a cross-claim against Owens Equipment & Erection Company. Finally, plaintiff was granted leave of Court to assert a claim against Owens, the third-party defendant. Eventually, OPPD was dismissed from the suit and the only cause of action remaining was plaintiff's claim against the third party defendant, Owens.

Plaintiff, an Iowa citizen, alleged that jurisdiction was based upon 28 U. S. C. § 1332; that the defendant is incorporated in the State of Nebraska and has its principal place of business there. It is now uncontroverted, however, that defendant's principal place of business is in the State of Iowa. Hence, an independent basis of jurisdiction does not exist.

The law in Nebraska is that an independent basis of jurisdiction need not exist in order for plaintiff to assert a claim against a third party defendant. *See Union Bank & Trust Co. v. St. Paul Fire & Marine Ins. Co.*, 38 F. R. D. 486 (D. Neb. 1965); *Olson v. United States*, 38 F. R. D. 485 (D. Neb. 1965). Although this view was once the minority view, this Court believes it is correct.

> Properly read, *United Mine Workers* [*v. Gibbs*, 383 U. S. 715 (1966)], reemphasizes the fundamental principle that a federal court has *jurisdictional power* to adjudicate the *whole case*, i.e., all claims, state or federal, which derive from a common nucleus of operative facts . . . [S]ince there is jurisdictional power to hear the whole case, the question is one of trial court discretion whether to exercise that jurisdiction, considering all the factors of economy and convenience in the context of federalism. 3 *Moore's Federal Practice* § 14.27 [1], 14-569 to 14-570.

This case is nevertheless novel, in that the third party plaintiff was dsimissed. However, having determined that ancillary jurisdiction exists, it is only equitable that the Court now retain jurisdiction of this "pendent" claim.[1] Defendant waited until trial to present its motion to dismiss. Should the Court grant defendant's motion, plaintiff would be left without a cause of action, because the Iowa Statute of Limitations has run. Despite the fact the defendant has exclusive possession of the knowledge of the extent of its own business in Iowa, it remained silent on this issue until more than two years subsequent to the filing of the amended complaint. No reason for the delay has been offered and undoubtedly plaintiff was lulled into believing defendant's principal place of business was in Nebraska. As a matter of sound policy and logic, ancillary jurisdiction existed once and, under the facts presented in this case, this Court must retain jurisdiction.

An Order is filed contemporaneously herewith, in accordance with the findings dilineated herein.

Dated this 22nd day of January, 1976.

ORDER

(Filed January 23, 1976)

In accordance with the Memorandum filed contemporaneously herewith,

IT IS HEREBY ORDERED that defendant's motion to dismiss is denied.

Dated this 22nd day of January, 1976.

BY THE COURT

/s/ Robert V. Denney,
United States District Judge

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1 The Court is aware that "pendent jurisdiction" refers to state claims joined with federal claims and uses the term here in its ordinary context.

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE, MOTION FOR NEW TRIAL

(Filed January 23, 1976)

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Comes now the defendant Owen Equipment and Erection Co. and moves the Court, pursuant to Rule 50 of the Federal Rules of Civil Procedure, to have the jury verdict and judgment entered on said jury verdict set aside and to have judgment entered in accordance with this defendant's Motion for Dismissal or In the Alternative, Motion for Directed Verdict. This defendant sets forth the following good and sufficient reasons in support of this Motion.

1. Plaintiff's Amended Complaint fails to state a claim upon which relief can be granted to plaintiff.

2. This Court does not have the jurisdiction over the subject matter of this action, or over the parties plaintiff and defendant.

3. That the evidence introduced by plaintiff, together with all reasonable inferences to be drawn therefrom is insufficient as a matter of law to make a prima facie case against this defendant.

4. That the evidence offered by plaintiff, together with all reasonable inferences which may be drawn therefrom, shows no act of negligence on the part of this defendant.

5. That the evidence offered by the plaintiff shows that the plaintiff's decedent was guilty of contributory negligence sufficient to bar his recovery as a matter of law.

6. That the evidence offered by the plaintiff shows that the plaintiff's decedent assumed the risk and thus, plaintiff is precluded from recovering as a matter of law.

7. That there is no competent proof that the acts of this defendant were the proximate cause of the accident or of any of the plaintiff's alleged damages.

8. That there is no competent proof that plaintiff was damaged to any extent as alleged in her Amended Complaint.

MOTION FOR NEW TRIAL

Comes now the defendant Owen Equipment and Erection Co., pursuant to Rule 50 of the Federal Rules of Civil Procedure, and in the alternative to the above requested Motion for Judgment Nothwithstanding the Verdict, moves the Court for an Order setting aside the jury verdict and judgment entered thereon and granting a new trial to this defendant for the following good and sufficient reasons.

1. The verdict and judgment are contrary to law.

2. The verdict and judment are contrary to the evidence.

3. The Court erred in sustaining objections of plaintiff to evidence offered for and on behalf of the defendant.

4. The Court erred in overruling the objections of defendant to evidence offered for and on behalf of the plaintiff.

5. The Court erred in giving Paragraph No. 5 of Instruction No. 5.

6. The Court erred in giving Instruction No. 7.

7. The Court erred in giving Instruction No. 8.

8. The Court erred in giving Instruction No. 9.

9. The Court erred in giving Instruction No. 12.

10. The Court erred in giving Instruction No. 13.

11. The Court erred in giving Instruction No. 14.

12. The Court erred in giving Instruction No. 16.

13. The Court erred in instructing the jury in all of said instructions in such a manner as to give undue weight to plaintiff's evidence.

14. The Court erred in refusing to sustain defendant's Motion for Dismissal or in the alternative, for a directed verdict at the close of plaintiff's evidence.

15. The Court erred in failing and refusing to give each of the defendant's requested instructions.

16. Irregularities in the proceedings of the Court by which the defendant was prevented from having a fair trial.

17. The defendant was prevented from having a fair and impartial trial because of abuses and discretions by the trial court.

18. There were errors of law occurring at the trial and duly excepted to by this defendant.

19. The verdict rendered by the jury is excessive and appears to have been given under the influence of passion or prejudice.

20. That the cumulative effect of all the above and foregoing errors prejudiced the defendant and prevented it from having a fair trial.

OWEN EQUIPMENT AND ERECTION CO., a Nebraska Corporation,
Defendant

By /s/ David A. Johnson,

200 Century Professional Plaza,
7000 Spring Street
Omaha, Nebraska 68106

One of Its Attorneys.

ORAL ARGUMENT REQUESTED

Defendant respectfully requests that oral argument be granted on the above Motion.

AMENDED MOTION FOR NEW TRIAL

(Filed January 26, 1976)

Comes now the defendant Owen Equipment and Erection Co. and amends its prior Motion for New Trial and specifically reserves all other objections and errors of law referred to in the original Motion for New Trial, to-wit:

1. The Court erred in giving Instruction No. 15.

2. Defendant withdraws Paragraph 10 in its original Motion for New Trial relating to the alleged error by the Court and in giving Instruction No. 13.

3. The Court erred in giving any instruction relating to liability of this defendant on the basis of any agency relationship between the crane operator, David Morrow, and this defendant.

OWEN EQUIPMENT AND ERECTION CO., a Nebraska Corporation, Defendant

By /s/ David A. Johnson,

200 Century Professional Plaza,
7000 Spring Street
Omaha, Nebraska 68106

One of Its Attorneys.

MEMORANDUM

(Filed February 6, 1976)

DENNEY, District Judge

This matter comes before the Court upon the motion of defendant for judgment notwithstanding the verdict or, in the alternative, for new trial [Filings No. 103, 104]. The Court shall ignore counsel's irrational, inflammatory language in his supporting brief directed as his misconception of judicial impropriety and shall address the legal issues

raised. Counsel's request for oral argument before this Court on said motions is denied.

Defendant take vehement exception to this Court's denying its motion to dismiss. Defendant asserts that the Court acted in contravention of direct Eight Circuit precedent, citing *United States v. Lushbough,* 200 F. 2d 717 (8th Cir. 1952). Defendant should read this Court's Memorandum carefully. The Court based its decision on *United Mine Workers of America v. Gibbs,* 393 U. S. 715 (1966), which was decided long after *Lushbough.* Likewise, defendant's exception to this Court's comments concerning defendant's long silence on the jurisdictional issue is the result of failure to comprehend the Court's holding. This Court held that retention of ancillary jurisdiction is discretionary with the trial court. The untimeliness of defendant's motion is unquestionably relevant to the exercise of discretion. Furthermore, with regard to defendant's assertion that this Court is following a bare minority rule, the Court requests counsel to read Professor Moore's *Federal Practice*:

> In the first edition of this treatise the view was taken that if, as permitted under the Rule, plaintiff A. B. amended his complaint to state a claim against the third-party defendant E. F., independent grounds of jurisdiction would be required to support plaintiff's claim against E. F.
>
> . . .
>
> The Supreme Court decision in *United Mine Workers v. Gibbs* calls for reexamination of the majority view . . . [footnotes omitted,] § 14.27[1] at 14-565, 568.

The Court also directs counsel's attention to *Morgan v. Serro Travel Trailer Co., Inc.,* (U. S. D. C. Kan., Dec. 30, 1975), 44 L. W. 2334, in which Judge Rogers, in a detailed discussion, arrived at the same conclusion this Court did, based on *United Mine Workers.*

Furthermore, it is fundamental that once the main claim falls out, provided there was subject matter jurisdiction

over that claim, the Court may, in its discretion, retain jurisdiction over the ancillary claim. In *Federal Prescription Service, Inc. v. Amalgamated Meat Cutters and Butchers Workmen of America et al.,* Slip No. 74-1451, 1469 (8th Cir., Dec. 18, 1975), the Eighth Circuit upheld a trial court's retention of a pendant claim in which the trial judge actually found that the main claim "lacked substance and was filed mainly to give this court jurisdiction over the pendent count." Slip Opinion at 22.

Obviously, the question is not without difficulty. However, the law is not stagnant. Trial courts must make new law in the absence of direct precedence, and this Court conscientiously applied its sense of justice to this case.

Defendant also takes exception to the Court's instructions on master-servant. Defendant asserts that there was no evidence of any control exercised by Owen over Morrow. However, the test is not control, but the right to control, as defendant itself recognizes in citing *Houlihan v. Brockmeir,* 258 Ia. 1197, 141 N. W. 2d 545 (1967). Certainly there was sufficient evidence of the right to control as evidenced by testimony concerning Supervisor Harry Flynn.

In addition, defendant now raises the assertion that it has carefully examined the authority in the State of Iowa relating to the elements necessary for the creation of a borrowed servant "and finds cases at odds with this Court's instructions." The Court would have greatly appreciated this discovery prior to its instructing the jury. Counsel cannot raise this objection in a post-judgment motion, not having presented the objection on these grounds *prior* to instructing the jury. Furthermore, the defendant did not suffer prejudice in consideration of the instruction on "servant of two masters."

Defendant also takes exception to the verdict on the basis that it circumvents workmen's compensation laws. This, perhaps, also would have been a persuasive argument if presented properly to the Court in a pre-trial motion.

Defendant objects to the Court's failure to give each of its requested instructions. Local Rule 27 provides that "[as] far as practicable and unless otherwise ordered, each party shall submit to the judge and serve on all other parties any requested instructions on or before the opening day of trial. Additional requested instructions relating to matters arising during the trial may be submitted and served at any time prior to the conclusion of the testimony." On or about December 17, 1975, the parties received written notice that this case appeared second on the January, 1976, trial list. Defendant's failure to submit requested instructions until after the close of the evidence is not only contravention of the local rule, but is also inexcusable.

Defendant objects strongly to the Court's instructing on agency because plaintiff did not plead this theory of recovery. It is fundamental that pleadings lose their significance when a case is tried. Where justice requires, pleadings shall be amended to conform to the evidence. A defendant may not sit by and allow evidence to be admitted without objection and later be heard to claim prejudice. Only during the opening statement by plaintiff did defendant object to plaintiff's agency theory as improper argument and not pleaded. The Court sustained the objection on the basis of improper argument. When evidence was offered on the ageny relationship, defendant never objected.

Even in the event defendant did object, the Court would have admitted the evidence in the interests of justice. Defendant's claim of prejudice flies in the face of reality. Defendant certainly knew that plaintiff intended to try this matter on an agency theory when it moved for summary judgment. Summary judgment was denied November 14, 1975, because plaintiff's brief raised a "genuine issue of fact as to whether Kohler and Morrow were employed by the defendant . . ." [Filing No. 81].

The Court has reviewed the file and proceedings in this matter and concludes that the evidence was sufficient and defendant suffered no prejudicial error emanting from the Court.

An Order is filed contemporaneously herewith in accordance with this Memorandum.

Dated this 6th day of February, 1976.

ORDER

(Filed February 6, 1976)

In accordance with the Memorandum filed contemporaneously herewith,

IT IS HEREBY ORDERED that defendant's motion for new trial or judgment notwithstanding the verdict is denied.

Dated this 6th day of February, 1976.

BY THE COURT

/s/ Robert V. Denney
United States District Judge

NOTICE OF APPEAL

(Filed February 26, 1976)

Notice is hereby given that Owen Equipment and Erection Co., defendant above named, hereby appeals to the United States Court of Appeal for the Eighth Circuit from the final judgment and order entered in this action on the 6th day of February, 1976.

OWEN EQUIPMENT AND EREC-
TION CO., A Nebraska Corporation,
Defendant

By /s/ David A. Johnson

200 Century Professional Plaza
7000 Spring Street
Omaha, Nebraska 68106

One of Its Attorneys

AMENDED
NOTICE OF APPEAL

(Filed February 26, 1976)

Notice is hereby given that Owen Equipment and Erection Co., defendant above named, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the final judgment entered in this action on January 20, 1976 and from the Order overruling Motion for New Trial entered on February 6, 1976.

OWEN EQUIPMENT AND EREC-
TION CO., a Nebraska Corporation.
Defendant

By /s/ Michael P. Cavel
of The Law Offices of Emil F. Sodoro, P. C.

200 Century Professional Plaza,
7000 Spring Street,
Omaha, Nebraska 68106.

One of Its Attorneys.

PARTIAL TRANSCRIPT OF PROCEEDINGS
[Page 1] MORNING SESSION

January 13, 1976
10:42 a. m.

THE COURT: Is there anything to be brought up before we bring in the jury?

MR. DINSMORE: No, Your Honor.

THE COUURT: All right, you may bring in the jury.

(Jury Present)

THE COURT: You may call your first witness.

MR. DINSMORE: Your Honor, the plaintiff will call Mr. Fred Kohler.

FRED H. KOHLER

called as a witness on behalf of the plaintiff, having been first duly sworn testified as follows:

Direct Examination

BY MR. DINSMORE:

Q. Would you state your name for the record, please?

A. I beg your pardon?

Q. State your name for the record, please, sir.

A. Fred H. Kohler.

Q. Mr. Kohler, the acoustics are awfully bad in [Page 2] here and I will try to speak loudly and if you don't hear me, just say you don't understand or say you don't hear me, will you do that?

A. All right.

Q. And where do you live, sir?

A. 2817 South 19th, Omaha.

Q. That is here in Omaha, Nebrask?

A. Yes, sir.

Q. All right, and what is your job, sir?

A. Machine shop foreman, Paxton and Vierling Steel.

Q. And you are a machine shop foreman there, and would you tell us what your duties are there as a machine shop foreman?

A. To supervise the operations there in the machine shop and maintenance in some cases, help with maintenance.

Q. And so you are sort of over the men who are machinists, would that be a fair statement?

A. Yes, sir.

Q. And how long have had that duty and responsibility down there at Paxton and Vierling?

A. About five years.

Q. Mr. Kohler, you were in the courtroom this morning while the opening statements were being made by the attorneys, is that correct?

A. Yes, sir.

[Page 3] Q. You have had an opportunity, I assume prior to today to talk with the attorneys and your deposition has been taken previously, is that correct, sir?

A. Yes, sir.

Q. And you know we are here about the death of Mr. James Kroger?

A. Yes.

Q. Back in January of 1972?

A. Yes, sir.

Q. So, were you called upon that day to assist in the operation of a crane?

A. Yes.

Q. All right, and if you would just tell us what kind of crane it was and a little bit the crane and how it was operated?

A. It is a Lorraine motor crane. It is mounted on a truck, rubber wheels, and it has a sixty-foot boom on it or did at the time and it is used primarily for lifting.

Q. Is this one of the cranes that we see around a construction area or is there anything different?

A. It is similar.

Q. There is nothing different than the way we see them around a construction site, is that correct?

A. It is similar to those, yes.

[Page 4] Q. And reference has been made to its as a twenty-five ton?

A. Yes.

Q. All right. Now on the day in question back in January of 1972, do you know, sir, who owned that crane?

A. Owen Erection and Equipment.

Q. Did you know that in January of 1972?

A. I have known it—yes.

Q. Sir, do you remember back on June 3rd of 1974, Mr. Johnson and myself came out to the plant area and took your deposition?

A. Yes, sir.

Q. And do you remember that Mr. Jack Fitch, Court Reporter, was there much like Mrs. Casper here is taking down the testimony?

A. Yes.

Q. And at that time you swore to tell the truth?

A. Yes.

Q. Just as the Judge swore you in today?

A. Yes, sir.

Q. Do you remember at that time sir, on page 60, line 10, I asked this question, and this was in June of 1974, question by me:

"QUESTION: Do you know who owned that crane?"

"ANSWER: No, I don't. I don't know for sure who [Page 5] owns it. I would assume Paxton and Vierling did but I couldn't say for sure."

"QUESTION: You don't know one way or the other?"

"ANSWER: No."

"QUESTION: Do you know now?"

"ANSWER: No."

Q. Do you remember at that time I asked you those questions and you made those answers at that time, sir?

A. Well, I could probably say the same thing right now. I could not prove that Owen E and E owns the crane right now. I assume that they do or I think that they do. I am sure that they do.

Q. Has that been—

A. (Interrupting) But I don't have—I wouldn't have any way of proving who owned it myself.

Q. But, uh, is what you are telling us now what you understand since the time of your deposition?

A. Not particularly; I would suppose, I suppose I might have formed that conclusion since then but at the time, as I said, I said I did not know for sure. That is probably the case.

Q. But there is no question that you did make those answers to those questions, is that correct, sir?

A. No doubt.

Q. I want to visit with you for a few minutes, sir, [Page 6] as to the facts as to how Mr. Kroger was killed. Approximately what time of day was it when you were asked to assist in the operation of the crane?

A. Shortly after the lunch hour.

Q. All right, and I know that this is a two-man operation, is it not, to run the crane itself?

A. Yes.

Q. All right, would you explain what the two men do?

A. Well, in this particular operation, one part of the crane is—one would drive the truck and the one would run the dragline itself.

Q. All right, is there anything in the operation of it this day, is there any way that you then—excuse me. Were you operating the truck part?

Q. And Mr. David Morrow was operating the crane part or dragline part?

A. Yes.

Q. On this day in question, the day Mr. Kroger was killed, could you see Mr. Morrow and could he see you and could you communicate between one another?

A. No, I could—from where I was sitting in the truck, I could not see Dave unless I would turn around and look at him. I could see him if I turned [Page 7] around, yes.

Q. But you would not normally when you were driving the truck turn around and look at him?

A. Well, no.

Q. And what about as far as — well I will try to — did you operate the truck from the time it was first moved or hooked up to the tank until it came in contact with the overhead wires?

A. No.

Q. All right, tell the ladies and gentlemen of the jury just what the setup was or how that came about?

A. The operator, Mr. Morrow, put the crane in position near the tank in its original position, and then he came and got Mr. Kroger and myself. We went out and hooked the tank up. Mr. Morrow picket it up and put the boom out over the front of the machine in near horizontal position, and he drove the truck himself, and Mr. Kroger and I walked along and steadied the tank, keeping it from moving around too much as we moved over there to the location where we intended to raise it up.

Q. All right, and so it was Mr. Morrow who drove it underneath the lines, is that correct?

A. Right.

Q. All right just to orient yourself, sir, if [Page 8] that way to the front of the courtroom or to the back of the courtroom however you want to describe it is north and

that way would be east (indicating) and behind you is south and off to your left is west, what general direction were you going?

A. West.

Q. All right, did there come a point in time—excuse me. I will withdraw that. The boom was out horizontal to the ground, was it not, sir?

A. Yes, sir.

Q. Do you know what angle it was at?

A. Very little of an angle.

Q. Pretty much perpendicular to the ground?

A. Yes.

Q. Or, excuse me, parallel?

A. Horizontal to the—

Q. Parallel (indicating)?

A. Yes.

Q. And the tank was attached to it from the dragline down.

A. Yes.

Q. Approximately how far was the tank off of the ground, if you can recall?

A. Two or three feet.

Q. And then you reached a point in time where [Page 9] you were over these power lines, is that correct?

A. Under it.

Q. Excuse me, under the power lines, is that correct?

A. Yes.

Q. And then you took over the truck operation part of it?

A. Yes.

Q. And then would you tell me what happened?

A. Well—

Q. Could you go any further west?

A. Yes, yes. As the boom started raising a little at a time, I tried to move forward. I did move forward.

Q. Excuse me, the point I wanted to make was was there a building obstructing you to the west?

A. Yes.

Q. So there was a building in front of you?

A. Yes.

Q. And the overhead lines above you?

A. Right.

Q. And approximately how far were the lines off the ground?

A. Thirty to thirty-five feet.

Q. And it was a sixty-foot boom, was it not?

A. Yes.

[Page 10] Q. And the building was in front of you so you couldn't go any further west, is that right?

A. Yes.

Q. And so what was the intended purpose, sir? Were you trying to do—what were you trying to do as far as booming-up so that you could—

A. (Interrupting) To avoid getting too close to the wires, by booming the machine up, and moving the truck ahead, eventually you would succeed in getting the boom on the other side of the wires in a position high enough to pick this tank up and put it where it belonged.

Q. You were not operating the crane part, though, were you?

A. No, sir.

Q. At any time did you see an arcing between the overhead lines and the boom, arcing of electricity?

A. No.

Q. At any time did you see, sir, an arcing from the tank to where Mr. Kroger was?

A. Yes.

Q. At any time during this operation was Mr. Kroger touching the tank at all?

A. No.

Q. How far was he from the tank, from your [Page 11] observation, sir?

A. He could have been two to four feet, or six feet.

Q. It was not a matter of inches, in any event?

A. No, sir.

Q. Sir, as the boom was going up, do you know what the angle of the boom was?

A. No, no I don't.

Q. Do you know what a boom indicator is, sir?

A. Yes.

Q. Or angle indicator, is that sometimes called an angle indicator?

A. Yes.

Q. And what is that?

A. It is a device in the machine that tells the angle of the boom in relation to the ground as it is raised, it moves.

Q. Did this crane have a boom indicator on it?

A. I really don't know. If I had to guess, I would say it did not, but I am not positive.

Q. Is the function of a boom indicator so the operator can see whether he was within safe limits as far as raising the boom?

MR. JOHNSON: I object to the form of the question.

[Page 12] THE COURT: I think it calls for a conclusion. You can ask him, "What is the purpose of the boom indicator as far as your experience is concerned?"

Q. (By Mr. Dinsmore) All right, sir, what is the function of a boom indicator and why is it on cranes?

A. I think it is to keep the operator from getting the boom high enough so it could tip over backwards. I would guess that is what its function is. I am not a crane operator. I really don't know that either, but I would guess it is so that the operator would know what angle that boom is on, and after a certain point, it becomes dangerous if it is too straight, I would guess.

Q. Or coming into proximity to wires?

A. Not necessarily. I think it would be—I think that angle indicator is not primarily for that reason, no.

Q. So, again when your deposition was taken back in June of 1974, page 86:

"QUESTION: You did not have a boom indicator on that crane that day, did you sir?"

"ANSWER: No, we put one on, but I think it was after that accident happened."

"QUESTION: What is the function of a boom indicator?"

[Page 13] "ANSWER: So the operator can see whether he is within his safe limits as far as raising the boom or not, to know approximately what angle he is on and so forth."

Do you remember me asking you those questions at that time, sir?

A. Yes.

Q. Do you recall giving those answers back in June of 1974?

A. Well, I can't remember that far back but I probably did answer just like that.

Q. Sir, you just made mentioned that you are not a crane operator, is that correct?

A. Yes.

Q. Do you belong to any unions that are engaged in the operation of heavy machinery, specifically cranes?

A. No, sir.

Q. Have you ever been?

A. No, sir.

Q. And is the operation of this crane—this is a two-man operation, is it not?

A. Yes, sir. At certain times, depending on what it is being used for.

Q. And on this day, it was a two-man operation, was it not?

[Page 14] A. Yes, yes.

Q. And there is one of the two men chosen to operate the crane?

A. Yes, sir.

Q. Now, who was Mr. Harry Flynn?

A. Harry Flynn, I believe worked for Owen Erection and Equipment. He was an erection superintendent some years back.

Q. All right, he was an employee of Owen Equipment and Erection Company, does that seem correct to you?

A. That I could not swear to. I assume he was.

Q. And he would go out on jobs, would he not, outside the plant?

A. Yes.

Q. Did Mr. Flynn ever instruct you to go to outside jobs?

A. I don't recall any specific jobs I ever went out of the plant on. I may have just driven a truck not as an operator or something, but I may possibly have driven the truck outside, but I cannot recall any specific occasions.

Q. When you say the truck, do you mean the truck part of the crane?

A. Yes, sir.

Q. Well, when you would go on outside jobs, would [Page 15] you consider Mr. Flynn your supervisor?

MR. JOHNSON: I object to the question. It does not properly reflect Mr. Kohler's testimony. He said he could not remember for sure. It calls for hearsay. It calls for a legal conclusion. There is no timeframe as to whether we are talking about the day of the accident or twenty years ago or when we are talking about.

THE COURT: Sustained.

Q. (By Mr. Dinsmore) I suppose I have to ask you: Did you ever go on any outside jobs outside of the Paxton and Vierling plant with Harry Flynn who was the construction superintendent for Owen Equipment and Erection Company, sir, in years past at any time?

A. If I went out on a job where he was, it was probably with the machine or maybe just to take it to a job and back or something like that. I never did work with him as my supervisor directly.

Q. Back in June of 1974, when we took your deposition out at the plant, you swore to tell the truth then?

A. Yes sir.

Q. And Mr. Johnson was there?

A. Yes, sir.

Q. And I asked you, page 84, line six:

"QUESTION: And before that what about Mr. Flynn, [Page 16] did Mr. Flynn ever do that?"

"ANSWER: Yes, if I was working on a job and he was in charge of it."

"QUESTION: Was that primarily outside stuff?"

"ANSWER: Yes."

"QUESTION: With Mr. Flynn?"

"ANSWER: Or the others, all the outside stuff was a lot of years back and it was not too frequent."

"QUESTION: Did you consider Mr. Flynn one of your supervisors?"

"ANSWER: Depending on the time, yes. He was at different times. I would consider him my supervisor, yes, sir."

Do you remember me asking you those questions back in June of 1974, Mr. Kohler?

A. I don't remember you asking me questions. I don't remember back that far, but if they are in that record, I probably answered them that way.

Q. You don't have any dispute that the Court Reporter took them down wrong or anything?

A. No, no.

Q. So you did consider Mr. Flynn one of your supervisors then, didn't you?

A. No, sir. Not directly, I have to clarify that. I would respect him as somebody in an official capacity [Page 17] but not absolutely my supervisor because I was working for Paxton and Vierling Steel and if I was sent any place it was by somebody there.

Q. Sir, are you at variance then with what you told us before when you said, "Depending on the time, yes. He was at different times. I would consider him my supervisor, yes, sir."?

A. Now what is your question now, please?

Q. Are you at variance then with that former statement you made before?

A. No. Because it could be interpreted—however you want it—I mean that is the way I look at it.

Q. Sir, was it your responsibility or did anyone ever instruct you from Owen Equipment and Erection Company or Paxton and Vierling Steel Company that you were to have the responsibility to see that the crane complied with the safety rules and regulations?

MR. JOHNSON: Just a moment, I object to the question.

THE COURT: It is just asking for "yes or no".

THE WITNESS: Could I have the question again, please?

Q. (By Mr. Dinsmore) Yes, my question basically, sir, was whether anyone from Owen Equipment and Erection Company or from Paxton and Vierling ever instructed you [Page 18] that you were to be in charge of the safety rules and regulations concerning the crane?

A. No, no.

Q. That was not your duty?

A. No, sir.

Q. Do you know whose duty it was?

A. No, I don't really know.

Q. In the operation of a crane, sir, are there devices called proximity warning devices?

A. I have heard of them.

Q. Are they devices that can tell you whether or not you are getting close to electrical transmission lines?

A. I presume so.

Q. Did this crane from Owen Equipment and Erection Company have such a device on it?

A. Not to my knowledge.

Q. Mr. Kohler, were you then as far as you know the only witness as to the arcing of electricity passing into Mr. Kroger?

A. Yes, I think so.

Q. And were you the first one to him sir?

A. Yes.

Q. Did he die instantaneously, sir?

A. No, I don't think he died instantaneously.

Q. Excuse me—I didn't mean to interrupt you. [Page 19] I was just going to ask you what his condition was when you first arrived?

A. Well, on that, he was laying on the ground and he had labored breathing. I would say like semiconscious.

Q. Was he evidencing any pain or moaning?

A. Yes, he—yes, he was.

Q. Did he say anything to you?

A. He said, "Help me."

Q. Did you send for the first aid man or the rescue squad?

A. Yes.

MR. DINSMORE: You may examine.

Cross-Examination

BY MR. JOHNSON:

Q. Mr. Kohler, as I understand your testimony, Mr. David Morrow came into the shop area where you were that day and asked you to come out and help him move that crane, is that how it was?

A. Yes.

Q. Had he previously been sent out by you to get the crane and get it ready or by someone else?

A. By one of the supervisors, he had been sent out.

Q. Who was that?

[Page 20] A. I think it was Clem, Clem Rosemary.

Q. Is he an employee of Paxton and Vierling?

A. Yes.

Q. Was he on that day?

A. Yes.

Q. Mr. Morrow then came back in and told you he had the crane ready or something to that effect?

A. Yes, sir.

Q. And so was it you then that got Mr. Kroger or said something to Mr. Kroger to the effect that "Let's you and I go out now and help him"?

A. That is right.

Q. Was Mr. Kroger under your supervision at that time at Paxton and Vierling?

A. Yes, sir.

Q. What was his job?

A. He was a machine operator.

Q. Pursuant to your statement to him, then, the two of you along with Mr. Morrow walked out of the machine shop area to the yard itself, is that correct?

A. That is right.

Q. And the crane was out there and the crane was in the vicinity of this airtank, is that right?

A. Yes, yes.

Q. Mr. Dinsmore has asked you to assume there are [Page 21] certain directions here and unless I am mis-

taken I think he asked you to assume the same directions here in the courtroom that I asked the ladies and gentlemen in the opening statement to assume?

A. Yes.

Q. And that is where they are sitting is the general location of where the tank was going to be placed?

A. Right.

Q. And the way I am pointing now would be west?

A. Yes, sir.

Q. And to your right would be east, is that right?

A. Yes.

Q. And then south (indicating) and north (indicating) behind you and behind me respectively?

A. Yes, yes.

Q. And where I am sitting then here in the courtroom just for the purposes of illustration, Mr. Kohler, were there some buildings or was there a building that ran pretty much in an easterly and westerly direction?

A. Yes.

Q. And is that generally the building or the vicinity of where the machine shop was where you were located?

[Page 22] A. Yes.

Q. You and Mr. Kroger?

A. Yes.

Q. And then did you walk out of a door that would be on the south side into the yard itself?

A. Yes.

Q. The yard being the area more or less right here in in front of all of us here in the courtroom, is that right?

A. Yes, yes.

Q. And the crane then would be down along toward your right? Or as to the ladies and gentlemen of the jury, to their front, is that right?

A. Yes.

Q. Which direction was the crane facing, the boom itself, when you went out, do you remember that off-hand?

A. I think it was facing south.

Q. In relation to these buildings then that ran east and west, where was the airtank initially sitting?

A. It would be on the south, the south end of the yard.

Q. And the south end of the yard then would be pretty much in the area where you are, so to speak, [Page 23] in the courtroom for purposes of illustration?

A. Yes.

Q. And is there a fence with barbed wire on it that runs east and west?

A. Yes.

Q. Along the lot line of the Paxton and Vierling property?

A. Yes.

Q. And that tank was located close to that fence then, is that right?

A. Yes.

Q. It was hooked up then?

A. When Dave came in and got Jim and me, we hooked it up, the three of us, or Jim and I, and then we proceeded from there.

Q. What was used to hook the tank up?

A. Chains.

Q. Were the chains wrapped around the tank in some fashion?

A. Yes.

Q. On each end?

A. Yes.

Q. With a loop in the middle?

A. Yes.

Q. And then the hook on the cable itself is hooked [Page 24] to the middle part of the chain?

A. Yes.

Q. And then the tank is lifted in the air?

A. Yes.

Q. By Mr. Morrow?

A. Yes, sir.

Q. And then did he get down to the truck part of the crane itself and then start moving it on in a westerly direction?

A. Yes.

Q. And so the crane then would be moving with the tank in the air toward the ladies and gentlemen of the jury, is that correct?

A. That is right.

Q. You and Mr. Kroger were standing on the ground initially and then walking along beside this tank, is that right?

A. Yes, sir.

Q. And you had the building on the north side of you and the fence on the south?

A. Yes.

Q. And then the building that you were going to was on the west, is that right?

A. That is right.

Q. Was there any other way, any other route, that [Page 25] you could have taken that day to get this tank to the location where you were taking it?

A. No, sir.

Q. You were aware of the fact that there were high tension wires over you, is that right?

A. Yes, sir.

Q. Where were you walking in relation to the tank, on the south side of the tank or on the north part of the tank as you were walking along?

A. I believe I was on the south side.

Q. Was Mr. Kroger on the north then?

A. Yes.

Q. As you proceeded underneath the wires did the boom in effect come up very close to the building itself, is that why you had to stop?

A. That is right.

Q. And if you went any further, the boom would go right into the building itself?

A. If you would go any further, the boom and the load would be too close.

Q. Too close to the building?

A. Yes.

Q. And at that time then, as I understand your testimony, Mr. Kohler, Mr. Morrow got out of the truck part of the crane and moved back to the control department, [Page 26] is that right?

A. Yes, sir.

Q. Where the controls and levers are to work the boom?

A. Yes.

Q. Did you then get into the truck part?

A. Yes, I did.

Q. What was your intention then as far as what you were doing or what he was doing in relation to placing this tank someplace?

A. We intended to drive ahead and boom-up a little at a time until we were far enough past the wires to be safe, and also have it up high enough to finish setting this tank where it belonged.

Q. Let's go back for just a minute and let me ask you: At any point in time from the time you and Mr. Kroger walked out of the shop until the time you were down in the position we just talked about next to the building, did you ever have a conversation or make a statement to Mr. Kroger about what you were going to do and what his job was?

A. Yes, I think we all three discussed this while we were hooking the tank up.

Q. And what part did you play in this discussion or conversation as far as statements to Mr. Kroger as to what he was doing that day?

A. I can't really exactly remember any exact words that I said to him. I probably warned him about these wires.

MR. DINSMORE: I am going to have to object to this. He cannot recall and he is paraphrasing and it is hearsay.

THE COURT: It is not hearsay, but unless you can recall the substance of what you said, then you can't testify to it.

THE WITNESS: Okay then, I won't answer that question.

Q. (By Mr. Johnson) Mr. Kohler, as I understand your testimony you said you could not recall the exact words?

A. That is right.

Q. Do you recall in any way the substance of what you said in any way to Mr. Kroger that day without getting

into the exact words, do you recall the substance of what you told him?

A. I said something in regards to watching the tank to make sure that it did not swing around or get out of control. That much I can remember saying.

Q. Do you remember the substance of anything else other than that?

[Page 28] A. No.

Q. All right, when you got the crane down to the position that we last talked about, that is with the boom right up against the building, and at the time that you got or walked from the ground up into the truck part of the crane itself, did you see where Mr. Kroger was standing?

A. He was—he moved down to the side near to the tank and like six feet away from it.

Q. Which direction was he facing in relation to the crane itself at that time?

A. He was facing the crane and the tank and me and Dave, of course.

Q. So in effect if I understand what you are saying then, at the time you got off of the truck part of the crane, you were first of all facing the tank itself and looking in effect at Mr. Kroger, is that right?

A. Yes.

Q. And would he be standing then somewhere down in the—

A. (Interrupting) Right about this position (indicating) yes.

Q. Over to the right of the ladies and gentlemen of the jury looking at or at least in the direction of the crane itself where you were and the tank, is that correct?

[Page 29] A. Yes.

Q. Do you recall now how many times that the boom was moved up and the truck moved forward kind of in sequence?

A. It had moved a couple of short distances like a foot or two at a time but I could not really say exactly how many times the boom was raised a little and the load dropped and so forth.

Q. It was at least one or two and possibly could have been more than that, is that right?

A. Yes.

Q. At the time that you saw this arcing between the tank and Mr. Kroger, had the boom itself been moved to the right at all, do you recall that?

A. No.

Q. It was still pretty much facing in a westerly direction?

A. Yes.

Q. And it had just been moving up, is that right?

A. Yes.

Q. Well, from the time that Mr. Kroger moved over to that position where he was standing facing the crane until the time of the accident, did he ever change positions that you saw?

A. No, he just stood there more or less in the

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[Page 116] January 13, 1976
3:05 p.m.

THE COURT: Bring in the jury.

(Jury present.)

THE COURT: Mr. Dinsmore, you may proceed.

MR. DINSMORE: Thank you, Your Honor. Your Honor and ladies and gentlemen of the jury, at this time, I

would offer as admissions against interest from the deposition previously taken of Mr. Edward F. Owen.

THE COURT: Who is not available for trial?

MR. DINSMORE: And this is offered as admissions.

THE COURT: As admission against interest?

MR. DINSMORE: But not his whole deposition.

THE COURT: You may take the s t a n d. Give us the page number and the line number of the question and answer.

MR. DINSMORE: Yes, Your Honor.

THE COURT: Now, ladies and gentlemen of the jury, an admission against interest is a statement made outside of Court by an individual which the plaintiff claims has the power to bind the defendant in this case and that is why he is offering these admissions. Now it is up to you to decide and I will give you instructions on admission against interest if we get that far. You may go ahead.

[Page 117] MR. DINSMORE: This is the deposition of Edward F. Owen taken at 1:30 p.m., June 3rd, 1974, and the appearances were Mr. Richard J. Dinsmore on behalf of the plaintiff, and Mr. David A. Johnson on behalf of the defendant Owen Equipment and Erection Company? May we waive the reading of the stipulation?

THE COURT: Yes.

MR. DINSMORE: And this was before Mr. Jack M. Fitch, Official Court Reporter, Omaha, Nebraska.

"EDWARD F. OWEN,

of lawful age, being by me, Jack Fitch, first duly examined, cautioned and solemnly sworn, as hereinafter certified, testified as follows:"

This is now page 3, line 6:

"Q. Would you state your name, please?

"A. Edward F. Owen.

"Q. And where do you live, Mr. Owen?

"A. 5420 Nicholas Street.

"Q. Is that in Omaha?

"A. Right."

On line 14:

"Q. What is your business, profession or occupation?

"A. President of Paxton and Vierling Steel Company."

Line 24:

[Page 118] "Q. What is the business of Paxton and Vierling?

"A. Structural steel for buildings and bridges, some manufacturing of various farm products, other similar products."

Page 5, line 9:

"Q. Now, I understand at one time you hired a man or there was a man working here by the name of James Kroger. Did you know Mr. Kroger?

"A. Slightly, not well. He was an employee in the machine shop. I didn't know him that well. I knew him, of course."

THE COURT: "I knew of him of course."

"A. I knew of him of course.

"Q. Was he employed by Paxton and Vierling?

"A. Yes."

Page 6, line 7:

"Q. Sir, we are also concerned here with Owen Erection and Equipment Company. Do you have any interest in that company?

"A. Yes. The Owen Equipment Company is owned completely by, owned by Paxton and Vierling Steel Company. It is 100 per cent owned subsidiary.

"Q. It is a separate corporation though?

"A. Oh, yes.

"Q. That is, Owen Erection?

[Page 119] "A. Owen Equipment and Erection Company.

"Q. Owen Equipment and Erection Company?

"A. Yes.

"Q. Now, are you telling me it is your understanding that this is a wholly-owned subsidiary of Paxton and Vierling?

"A. Yes.

"Q. In other words, the corporation, Paxton and Vierling, to your information, owns all of the stock of Owen Euipment and Erection Company?

"A. Yes.

"Q. Can you tell us why that was set up that particular way or when it was set up?

"A. I can't tell you exactly when it was set up, but it was set up that way to avoid any conflict between our shop, which is a non-union shop, and working in erecting steel on the outside, which is strictly a union proposition, and it was set up and when we first started it, we did quite a few erection jobs and things of this type and we did up until the passing away or—not the passing away, but the retirement, I should say of Harry Flynn, who was our outside erection foreman, up until the time of his retirement three or four years ago, in that range, and again those records are open and available for us.

[Page 120] "Q. So I can understand it, sir, Paxton and Vierling is non-union?

"A. Yes, non-union.

"Q. A nonunion shop?

"A. Right.

"Q. And when you go outside and you would begin the erection of something, construction of something, that has to be a union job?

"A. That's right, and that is when Harry Flynn, who was the superintendent of the company, would go out and hire ironworkers or whatever he needed to put up the jobs.

"Q. And would you tell me where the headquarters of Owen Equipment and Erection Company is?

"A. Here, same headquarters.

"Q. Same headquarters?

"A. Yes.

"Q. All right, and would you tell me who the officers of Owen Erection and Equipment Company are?

"A. In effect, the same as Paxton and Vierling?

"Q. Did you consider, in your own mind, at least, in the corporate structure, that one company is the same as the other?

"A. I don't really know how to answer that. I am not quite sure.

[Page 121] "Q. I have the impression in my mind's eye and I don't know, that you have the headquarters at the same place and you have the same officers and it seems to be operated out of the same place. Is one company just the same as the other?

"A. No.

"Q. How would you distinguish when you are doing Owen Equipment and Erection Company work and when you are doing Paxton and Vierling work?

"A. Well, primarily that is when they leave the premises and they go outside and erect a job, such as the Bur-

lington building down here or the postal part of it where we erected a bunch of big trusses, and the minute they leave the gates, it is Owen Equipment and Erection Company.

"Q. One has to do with steel fabrication and the other has to do with—

"A. Field erection.

"Q. With field erection?

"A. Yes.

"Q. And does Owen Equipment and Erection Company own some cranes, sir?

"A. Yes.

"Q. How many cranes do you present own?

"A. Two.

"Q. And can you give us a description of them?"

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[Page 200] THE COURT: And don't you want to add all of your other motions too?

MR. JOHNSON: I would, Your Honor, yes.

THE COURT: Have you got them written out?

MR. JOHNSON: Yes, I do.

THE COURT: I will tell you what I am going to do with it, without argument, I will tell you, Mr. Dinsmore, I am concerned about this, and I want to read those cases. I have got Judge Robinson's decision and I have even talked to him about it in the Northwestern Bell case, and I am not sure now why you didn't move to dismiss as soon as the amended complaint was filed, but of course at that time only the Omaha Public Power District was still in the case and then they went to the Eighth Circuit and got that dismissed out.

MR. JOHNSON: That is right, Your Honor, and in regard to that remark by the Court, let me also say this: As I read the cases, one of the reasons that the courts narrowly construed the doctrine of pendant and ancillary jurisdiction is for a situation just like this where the original defendant is brought in, claims are made, discovery is undertaken, and then who knows but what collusion does not exist in the case, if not practically or at least theoretically, as the basis for this doctrine, between the plaintiff and the defendant [Page 201] in bringing in the third-party defendant against whom then the plaintiff can make a direct claim when they ordinarily would not have been able to make it in the first place. That is inherent in the cases as I read them in regard to the narrow construction on ancillary and pendant jurisdiction, or the doctrine of that, and that is exactly what happened here. Owen Equipment was brought in initially as a third-party defendant and it could very well have been after counsel for a plaintiff in this case or his firm found out that they in effect did not have a case against Omaha Public Power District, who knows, who will ever know—we would get into attorney-client privilege, there is no way, I don't even want to inquire, and I don't say that is the case, but I say as a matter of theory in backing up this narrow construction of this doctrine, that is the exact basis for it, and I think that the basis for it fits into this case to a "T".

MR. DINSMORE: Judge, as to his basis number one, two and three, number one, the Court hit the nail on the head, there are very few things in Federal Court pleadings that a defendant has to allege, and I will check this specifically, as to the question of jurisdiction, it has never been brought up in his pleadings but why should the plaintiff suffer until the last date [Page 202] of trial when they finally discover and they have filed their answer the day of trial and they don't even allege in their answer, by the way Judge, anything about the principal place of business and I believe it is a requirement upon the defendant to raise, at the pleading stage, to raise this question which in the first instance they have not done for the very reason that the Court pointed out "Why didn't you bring this up before?" You certainly have had access to this defendant. You know where the principal place of business is. Mr. Dinsmore and Mrs. Kroger are not privy to the records of

Owen Equipment and Erection Company so I think in the Federal Rules of Civil Procedure it is incumbent on them to bring it up at the pleading stage that even getting away from the procedural requirements this is an exact case of ancillary or pendant jurisdiction and I think it is properly ancillary and I think that the main case on it is that United Mine Workers Case.

THE COURT: And there is a case in the Eighth Circuit of Kuhn (phonetic) against somebody, too.

MR. DINSMORE: Just to review the history of the case and I certainly don't have to tell this Court what happened, originally OPPD was brought in and we had some trouble with the political subdivisions tort claim act, and OPPD was brought in and there was proper jurisdiction [Page 203] and the Court had jurisdiction at that point in time. Thereafter the Court allowed OPPD to bring in Paxton and Vierling and Owen Equipment and Erection Company on two theories, one theory of indemnification and one theory of the third-party defendant. Thereafter Paxton and Vierling and Owen Equipment and Erection Company were brought in, and only then, did the plaintiff make application to the Court, and the Court gave approval that the plaintiff could join Owen Equipment and Erection Company as original defendants. That is exactly the principal and exactly the theory of ancillary jurisdiction. We can sit up here and guess the conjecture and Mr. Johnson can accuse me of collusion. If he wants to call Mr. Busick to come down from OPPD and if he wants me to take the stand, I will be more than happy to. Let's look at the facts and let's not stand up here and call attorneys names and accuse them of collusion. If there is any collusion or anything he maintains there is let him put his affidavit on file and I will be happy to face that. The point is the Court has jurisdiction in the first place. They analogize this ancillary jurisdiction to the equity doctrine and they call it the "clean-up doctrine." The fact that that primary issue is an equity question and there are questions of law which subsequently develop in an equity [Page 204] case, the equity court will take jurisdiction and

that is called the clean-up doctrine. Why should the plaintiff have to jump all over the United States and jump from court to court when they were properly in the court in the first place. And of course the Judge had not sustained the motion for summary judgment and I should point out that the reason you sustained the motion for summary judgment was not on jurisdictional grounds, it was on subtantive law. What if the Court had not sustained that? Do you mean that in that instance you would not be asked to reverse your decision in the first place and say that Owen Equipment and Erection Company should not be brought in here? That is exactly the reason, so that if the Court in the first instance has proper jurisdiction that all parties can be brought to one courtroom and to one jurisdiction and all at one time and prevent a multiplicity of lawsuits so that at one time all the issues and all of the facts can be determined and so on the first instance you will look to whether there was proper jurisdiction and the Court had proper jurisdiction, and that is the theory of ancillary jurisdiction and that is what happened here.

THE COURT: Do you agree that if there was no ancillary jurisdiction question that to properly plead the case in this Court against the sole defendant [Page 205] Owen Equipment and Erection Company that there must be proof that they are a Nebraska corporation and had their principal place of business in Nebraska and that you have diversity, do you not?

MR. DINSMORE: Not to try to get around anything, but aside from that very important issue of ancillary jurisdiction, I would also point out to the Court, to get back to the question of substantial justice, whose requirement is it when a party defendant is brought into a lawsuit and I think in checking the Federal Rules of Civil Procedure, it can't be specifically answered, and again this is coming off the top of my head but I think it is Rule Six or Seven or something like that, the defendant has to specifically raise in the answer, so even saying there was not any type of ancillary or pendant jurisdiction, the defendant has waived its right. It has filed its answer. It has filed an amended

answer and now at the close of the plaintiff's case they are attempting to get out by raising a jurisdictional question. I think it is too late. In addition to that, Your Honor, I would like to check the Federal Rules, but from the facts in front of the Court and I am not disputing the facts,—

THE COURT: I am going to just take the motion under advisement and I would like a brief in answer to [Page 206] this tomorrow morning because I am concerned about this question. Now, do you have any further motions?

MR. JOHNSON: Yes, I do, Your Honor.

THE COURT: If you have got them typed, don't read them.

MR. JOHNSON: No, Your Honor, I am sorry, I don't. Quickly, in response to Mr. Dinsmore, there are a few things that I want to mention. First of all, I am not accusing Mr. Dinsmore of anything. As a matter of fact, Your Honor, I think he would be remiss in his duty and obligation to his client if he did not attempt in every way he could to represent her as I am sure he has, and I mention that because of this matter of collusion that has been mentioned in the Court.

THE COURT: I understood that to be an example of the reason for the ruling and not as to the facts of this case.

MR. JOHNSON: Also in regard to his initial comment about our lateness in raising this, I would just say this—

THE COURT: That can be raised at any time.

MR. JOHNSON: That is right. This is not an equitable case.

THE COURT: That has been the rule since time began.

[Page 207] MR. JOHNSON: As to laches, estoppel, or waiver, the Court either has it or it doesn't.

THE COURT: The only thing that concerns me is this pendant or ancillary question. I once had jurisdiction and

then because one defendant is dismissed out of it, do I still retain the case? He is going to present a brief to that and then I want you to answer it. That does worry me. There is no question in my mind that it is proper to have jurisdiction against a sole defendant, say they just sued Owen Equipment alone, that you had to allege they had to be a Nebraska corporation and they had their principal place of business in Nebraska.

MR. DINSMORE: I agree with the Court.

THE COURT: And the proof shows that they had their principal place of business in Carter Lake, Iowa, and you did allege it in the amended complaint that they were a Nebraska corporation and they had their principal place of business in Nebraska.

MR. DINSMORE: Is that in the amended complaint?

THE COURT: That is in the amended complaint.

MR. DINSMORE: I am sure the Court is correct.

THE COURT: That the defendant, Owen Equipment and Erection Company is a Nebraska corporation with its [Page 208] principal place of business in Nebraska.

MR. DINSMORE: Is that paragraph one or two?

THE COURT: That is paragraph two of the amended complaint filed November 9, 1973.

MR. DINSMORE: Which I think they admitted in their answer.

MR. JOHNSON: No, we did not.

THE COURT: I don't think they ever admitted anything. The proof here before this Court today by the secretary of the Owen Equipment and Erection Company, their principal place of business was in Carter Lake, Iowa. That is the proof before the Court so there is a question here and it can only be obviated if this Court has pendant or ancillary jurisdiction. That is the point that I want to check overnight, but I am going to take that motion under advise-

ment and I will be able to tell you something about it tomorrow morning but I will require you to proceed while I am taking it under advisement.

All right now if you want to dictate the rest of your motions in, you can do that, because I would like to get this thing moving today. Are you going to introduce any evidence?

MR. JOHNSON: Yes, I am, Your Honor.

THE COURT: With the understanding that I am [Page 209] going to take all your motions under advisement?

MR. JOHNSON: Yes.

THE COURT: Is it necessary — could you write up your motions?

MR. JOHNSON: To save time, I can dictate them and have them typed.

THE COURT: All right, have them typed and file them and at this time for the record, I will assume that they have been filed and that I am taking them under advisement until the close of all the evidence in this case.

MR. JOHNSON: The two motions that I had in mind, Your Honor, that I intended to dictate now just for identification are a motion to strike the opinion testimony of the witness Samuel McMinn who testified yesterday in regard to his opinion, and secondly of course a motion for a directed verdict or in the alternative for a dismissal.

THE COURT: I understand.

MR. DINSMORE: Your Honor, Mr. Johnson has indicated to me and I may have a motion, it depends on what he intends to do, that he intends now to elicit some expert testimony. He told me that he intends to offer it as rebuttal and I would move in limine that that be stricken. He has never endorsed any such witness. He

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[Page 338] which has been criticized as I know the Court well knows and in addition to another case that has been in effect reversed and the opposite side has been taken and I want to say this for Mrs. Kroger's benefit, my personal feeling is this that—and I am sure the Court is doing what the Court feels is right under these circumstances—I personally feel that a great injustice would be done to Mrs. Kroger if this case were submitted to a jury with the motions under advisement and if a jury should happen to return a verdict in her favor to then have the Court on the basis of the issues that have been raised in effect take that verdict away from her. Of course if they return a verdict for the defendant, that makes the matter moot, and I would, with all due respect to the Court, I would urge upon the Court to make a ruling in connection with the motion to dismiss prior to the time this matter is submitted to the jury. I guess my point is that if there is no jurisdiction, there is no jurisdiction, and I am as convinced as I have ever been, and ordinarily you do not get a question that you say is that clearcut, but I am convinced as I can be that there is no jurisdiction in connection with this case.

THE COURT: The only one that even comes close is the ancillary question you brought up, once [Page 339] the Court has jurisdiction that they can retain it for the purpose of settling the dispute to save multiplicity of suits and if I would dismiss it for lack of jurisdiction, of course, the plaintiff is out of luck entirely because of the Iowa Statute of Limitations, and I still am going to adhere because I am thinking of court time more than anything else. I feel sorry for Mrs. Kroger and I don't know what I am going to do yet, I am still going to look up cases and I keep thinking all the time why is it out of 400 Federal Trial Judges, I get the cases where there has never been one like it before, never.

MR. DINSMORE: Judge, I apologize to the Court for not getting my briefs down to you until about five minutes before 10:00. I spent much time last night at Creighton and I am just as convinced as Mr. Johnson is, I found a case that was decided by Judge VanPelt that has been reported.

THE COURT: And it was not appealed.

MR. DINSMORE: And it was not appealed.

THE COURT: I know about that case.

MR. DINSMORE: And it is directly on point and there is Olson versus the United States versus Frenchman Cambridge Irrigation District, 38 Federal Rules Decisions 489, and, Judge, it is exactly on point. He cites all of the cases and it just happens backwards when you are [Page 340] doing research and I found all the other cases and found his case last and then he cites all of the cases in his case and he also cites some very excellent annotations especially one found at 33 Federal Rules Decision 27. Judge, the case is right on point. There is a split in the district and this all arises out of Rule 14, and Rule 14 saying that a plaintiff can bring a claim against a third-party defendant and it makes no mention whatsoever in Rule 14 about jurisdiction. That leaves it up to the Courts to decide. The rule in Nebraska, and there is no later decision than Judge VanPelt's is that the plaintiff even if there is no jurisdiction, even if there is no diversity between the plaintiff and the third-party defendant, he has ruled and has cited authorities in his opinion that it is not necessary, once the Court has jurisdiction, just as you were mentioning yesterday, the Court at one time can consider all of the claims and the plaintiff can bring a claim against a third-party defendant.

THE COURT: I knew about the case and I have even discussed this with Judge VanPelt but I do want to study it over, but I am still concerned about it. I am not sure whether his decision would have been upheld by the Circuit if it had been appealed.

MR. JOHNSON: Your Honor, may I indicate another [Page 341] case that I do not know if the Court has read or not but I have a photostatic copy without the front page that it would be 271 Federal Supplement page, I believe, 361. I have pages 362 and 363 and I have read the entire case.

THE COURT: Where did it come out of?

MR. JOHNSON: It came out of—I don't have the front page and I don't know the Circuit but I wanted to call the Court's attention to the case in light of this language that appears on page 362 where it is talking about the revision of Rule 14 which Mr. Dinsmore has brought out, this Court whichever Circuit it was said that when Rule 14 was amended in 1948 the Advisory Committee noted that in any case where the plaintiff could not have joined the third party originally because of jurisdictional limitations such as lack of diversity of citizenship, the majority view is that any attempt by the plaintiff to amend its complaint and assert a claim against an impleaded third-party would be unavailing. Now I wonder if Judge Van Pelt had the benefit of the Advisory opinion when he wrote the opinion in the Olson Case, and I call the Court's attention to this specifically in regard to Mr. Dinsmore's comment that Rule 14 is silent and it is up to the Court, it is not silent because the Advisory Committee has indicated what the majority rule is and I think this is a clear intent of

STATE OF NEBRASKA,
)
COUNT OF DOUGLAS)

A F F I D A V I T

Affiant, being duly sworn on oath deposes and states as follows:

1. That he is an attorney associated with the law firm of Swarr, May, Smith & Andersen, 3535 Harney Street, Omaha, Nebraska. That said firm represents Paxton & Vierling Steel Co. and Owen Equipment and Erection Co. (during the period of the latter's corporate existence) on a regular basis. That during 1972 and 1973 Paxton & Vierling Steel Co. and Owen Equipment and Erection Co. were served with summons in a case in the United States District Court for the District of Nebraska entitled Geraldine Kroger v. Omaha Public Power District, case number 72-0-481. That defense of any claims made against the above two parties was immediately turned over to the parties' liability carrier. The carrier employed the law offices of Emil F. Sodoro to represent the parties.

2. That the undersigned saw to it that all information, documents and records of the parties requested by the carrier or its attorneys was provided. Other than providing such documents, being present at conferences, depositions of the employees of the parties, and at trial, our firm was not involved in the above-captioned litigation, nor familiar with the progression of said litigation.

3. On the morning of January 6, 1976, I was informed by Mr. David Johnson that trial was to commence at 1:30 P.M. of that day. During the noon hour of January 6, 1976, another lawyer in the firm and I were discussing the case in a conversational manner when he inquired of me what the basis of federal jurisdiction was and where Paxton & Vierling Steel Co.'s principal place of business was. He was interested in that he was in the process of commencing suit in federal court on the client's behalf. This conversation aroused my curiosity concerning the Kroger case. Upon my return to the office, I examined our firm file to determine whether plaintiff was an Iowa or Nebraska resident. I discovered plaintiff was an Iowa resident. I attempted to call Mr. Johnson but could not reach him.

4. Since someone from the firm had been asked by the client to observe the trial, I went to the courthouse that afternoon and arrived during voir dire examination. After selection of the jury, there was a recess. During the recess, I informed Mr. Johnson that it appeared to me that there was no jurisdiction because in my view Owen Equipment and Erection Co. had its principal place of business in Carter Lake, Iowa. Mr. Johnson stated that that fact had never occurred to him. I suggested he should apprise the court of that possibility. Mr. Johnson stated he would check it out first.

5. The following morning, I was present in Mr. Johnson's office prior to trial. Mr. Johnson was interviewing Mr. David Morrow. After the interview was completed, we again discussed the question of jurisdiction. Prior to leaving Mr. Johnson's office, we reviewed the pleadings and it appeared to us from the pleadings that there had never been complete diversity. Mr. Johnson instructed a law clerk to research the question and submit a brief to Mr. Johnson as quickly as possible.

Further Affiant saith not.

Robert J. Becker

JULIE A. TROSHYNSKI GENERAL NOTARY COMMISSION EXPIRES MAR. 29, 1981 STATE OF NEBRASKA

Subscribed and sworn to before me this 29th day of June,

Julie A. Troshynski

STATE OF NEBRASKA)
) ss
COUNTY OF DOUGLAS)

A F F I D A V I T

DAVID A. JOHNSON, of lawful age, being first duly sworn on oath, deposes and says:

1. That he is associated with the law firm of Emil F. Sodoro, P.C., the firm that represented Owen Equipment and Erection Company in this action. The litigation file was assigned to this affiant on or about November, 1973, and this affiant was actively involved as attorney for the said Owen from that time through trial.

2. This affiant has carefully reviewed the opinion of this court filed June 21, 1977, particularly in light of this court's finding that defendant engaged in "subtle and adroit pleading", that defendant "connived for himself an unfair advantage" and that the question of the citizenship of Owen had been "concealed" for some two years after the filing of the Amended Complaint. This affiant adamantly denies that any of the above findings by this court are true.

3. This affiant further states that he never engaged in any intentional concealment of the citizenship of Owen. That he is unaware of anyone associated or employed by defendant or any of defendant's representatives or anyone, for that matter, who intentionally concealed the citizenship of Owen at any time before trial.

4. This affiant is unaware of the issue ever being discussed, communicated, alluded to, or thought of by anyone until the second day of trial when Mr. Robert Becker, corporate counsel for Owen, mentioned the question to this affiant. This affiant had the question researched and upon affirmation that this was, in fact, a viable issue it was presented to the court during trial.

Further affiant saith not.

David A. Johnson

Subscribed and sworn to before me this 29th day of June, 1977.

JULIE A. TROSHYNSKI GENERAL NOTARY COMMISSION EXPIRES MAR. 29, 1981 STATE OF NEBRASKA

Julie A. Troshynski